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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

GENARO GONZALES RIOS,

Petitioner,

v.

DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is petitioner entitled to a Certificate of Appealability when he has made a facial constitutional claim that material impeachment evidence regarding the sole accuser was concealed from him and which went to the core of the witness' testimony?

2. Is petitioner entitled to a Certificate of Appealability when he has made a facial constitutional claim that his trial counsel was ineffective in failing to use available evidence which impeached the accuser's motive in seeking petitioner and his other explanations, in failing to find an available witness who was allegedly at the shooting scene, in failing to object and present evidence that the "getaway car" was not the same car as the prosecution's photographs depicted, in failing to explain that a witness' purported fear of petitioner was based on what a police officer told him, and for failing to object to bad act evidence?

3. Is petitioner entitled to a Certificate of Appealability to establish actual innocence when the two persons whom the accuser claimed were the ones that shot him and killed another are now legally available and stand ready to prove they were not involved and when the accuser himself is unsure of other critical evidence which tied petitioner to the crimes?

PARTIES TO THE PROCEEDINGS

Petitioner (appellant below) is Genaro Gonzales Rios.

Respondent is the Department of Corrections for the State of California.

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PETITION FOR WRIT OF CERTIORARI

Genaro Gonzales Rios ("petitioner") respectfully petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Ninth Circuit denying petitioner a certificate of appealability regarding his writ of habeas corpus entered on February 22, 2005 and denying his petition for rehearing and petition for rehearing en banc entered on March 22, 2005, pursuant to Rule 10 of the Rules of the Supreme Court.

CITATION OF REPORTS OF OPINIONS ENTERED IN THE CASE

The unpublished judgment of the Court of Appeals for the Ninth Circuit issued on February 22, 2005 denying petitioner a certificate of appealability is attached as App. 1. The unpublished order of the Court of Appeals for the Ninth Circuit issued on March 22, 2005 denying petitioner a rehearing and rehearing en banc is attached as App.2 .

The unpublished order of the United States District Court for the Central District of California issued on September 17, 2004 denying petitioner's petition for issuance of certificate of appealability is attached as App.3. The unpublished ("report") and recommendation of the United States Magistrate Judge issued on August 4, 2004 is attached as App. 5.

The order of the California Supreme Court denying petitioner's writ of habeas corpus issued on January 29, 2003 is attached as App. 67. The unpublished Superior Court of California County of Orange statement of

decision issued on September 3, 1998 is attached as App. 68. The unpublished opinion of the California Court of Appeal, Fourth District, issued on March 30, 1984 is attached as App. 77.

JURISDICTION

The Court of Appeals' judgment was entered on February 22, 2005. A timely petition for rehearing and petition for rehearing en banc was denied on March 22, 2005. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). App. 152.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution as well as the provisions of the federal habeas corpus statute concerning the issuance of certificates of appealability found in 28 U.S.C § 1254(1) and § 2253, the rules regarding writs of habeas corpus regarding state prisoners found in 28 U.S.C. § 2254, and Federal Rules of Appellate Procedure Rule 22(b). Those provisions are supplied in App. 150, et. seq.

STATEMENT OF THE CASE

1. State Trial Court Trial Proceedings

In early February 1981 David Benavides was imprisoned on drug charges in La Mesa prison in Tijuana, Mexico. After a check payment of $5,000 to his attorney

which was a bribe or for other reasons Benavides was released from prison. He and his business partner, Abel Tarango, drove across the U.S.-Mexican border searching for money to cover the check. App. 78.

Benavides made telephone calls looking for petitioner because he claimed petitioner owed him $40,000 from a prior loan used to free petitioner from a Mexican prison and due to unpaid wages owed Benavides who worked for petitioner as a drug courier. Benavides and Tarango drove to the home of Humberto Perez, a relative, in Placentia in Orange County, California to wait for a call. App. 78-79

Petitioner called the next day saying he was sending $3,000 with Juan Castillo and Jose Bueno (called "Bala" or "bullet"). Later that evening, Castillo called Benavides to say they were lost and asked Benavides to meet them at a street corner in Anaheim. Humberto Perez drove Benavides to the requested corner and parked. Bueno approached the passenger side of the car where Benavides sat while the other person, whom Benavides identified at trial as Castillo, walked over to the driver's side. After a few words, Bueno said, "Genaro went up," pulled a gun from his jacket and fired a number of times striking Benavides in the hands and thigh. Witness neighbors heard shots and saw a four wheel drive truck speed away. Humberto Perez' car burst into flames. Fireman arrived to find Benavides injured and Perez dead from eight bullets. App. 79.

Six months later petitioner and Castillo were arrested in Los Angeles. Parked outside was a four wheel

drive truck. Despite Benavides' eye witness identification at trial that Castillo, a cousin, was the person who had gone to the driver's side of the car where Humberto Perez sat, Castillo was acquitted by the same jury which convicted petitioner of the murder of Perez with the use of a firearm while lying in wait and the attempted murder of Benavides. App 78-9, Petitioner was sentenced to life in prison with no parole..

Petitioner appealed and further alleged his trial counsel was ineffective because he waived cross-examination of Benavides and he failed to object to evidence of petitioner's drug trafficking. The state court of appeal on March 30, 1984 denied the appeal and writ citing state law. The court of appeal found the waiver of cross-examination was a trial tactic within reasonable competence. Since the answers to the excluded questions were not present in the record, the court would not speculate as to what the answers would have been. Trial counsel's reason for not objecting to the drug trafficking other crimes evidence was a trial tactic within reasonable competence since the evidence demonstrated that Benavides was selling heroin in Mexico, evidence necessary to impeach Benavides. App. 92-3. The California Supreme Court denied petitioner's petition for hearing. App. 59.

HOW THE FEDERAL QUESTIONS WERE RAISED BELOW

This petition presents three issues and several sub-issues, each of which was raised in post-conviction proceedings.

1. The state suppressed material impeachment evidence of Benavides, the sole witness.

Petitioner was granted a state evidentiary hearing based on testimony of a D.E.A agent that Benavides was acting as an informant before petitioner's murder trial, that Benavides provided a sworn declaration that he had received promises of immunity or no prosecution before he testified at petitioner's trial regarding substantial drug dealing and smuggling of narcotics from Mexico into the United States and that these facts were concealed from petitioner. During the 1998 hearing, petitioner learned of the existence of D.E.A. reports prepared prior to his trial which contained impeachment of Benavides' trial testimony. During the hearing, Hammaker, the homicide investigator revealed that just before trial Benavides had told the prosecutor and himself on several occasions evidence which would have impeached his trial statements implicating petitioner in drug dealing.

a. Evidence of immunity or promise of no prosecution.

During a pre-trial proceeding in People v. Bueno[1] on May 25, 1990 D.E.A. agent Edmundo Apodaca was asked if Benavides "agreed to work for you as an informant?" Apodaca testified , "not specifically for me. I think he was going to provide some information to the Los Angeles office", possibly for another D.E.A. agent, Ford.

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1. Bueno, a fugitive when petitioner was tried, was arrested in 1989. Bueno's charges were later dismissed as his right to a speedy trial had been violated.

App. 108-09.

Benavides provided a declaration in 1994 which stated in part that before petitioner's "trial in July, 1982, the police officers told me I would not be prosecuted for any concession, testimony or declarations that I made to the police officers with respect to my involvement in the trafficking or sale of drugs that I might have committed on my own or together with [petitioner] or any other person. App. 121.

Benavides affirmed his declaration when interviewed three years later by prosecutors; he was in the hospital in shock recovering from his wounds when the Anaheim Police agency told him he was not going to be prosecuted for any drug trafficking crime or drugs. During that time his mind was "lost." He recalled talking with homicide detective Hammaker but not with D.E.A. agents Apodaca and Ford. App. 123-26.

Benavides testified at the evidentiary hearing consistent with what he'd told petitioner and prosecutors. Benavides testified that when he had spoken about petitioner 's cocaine and marijuana dealings at trial, he had been promised protection by police. He knew protection to mean that he wouldn't be going to jail. App. 137-40. He was in a Santa Ana jail cell before petitioner's trial and talked with the prosecutor Ramirez just prior to his testimony in August, 1982 about his trafficking in large quantities of drugs. Due to the very severe trauma, Benavides' mind was not very clear. His descriptions of the shooters changed due to the trauma. He recalled speaking with Hammaker but not the details. Benavides

denied any recollection of talking with agent Apodaca or if he'd given him promises. Benavides could not recall speaking with agent Ford but he did recall providing information about petitioner's family. Agents offered him money but he didn't take it. App. 128-40.

Benavides was promised "they weren't going to give me any jail time if I helped them" say who hurt him. Police wanted to know about petitioner's drug activities. Benavides knew if he told officers about being involved in drug dealing he would put himself in danger of being prosecuted in criminal court. Benavides understood the protection promises was from "fear of being prosecuted." App. 137-40.

The state court found Benavides was unable to state who made promises to him and remembered no specifics. The court noted it was possible Benavides inferred some promises but habeas relief cannot be based on speculation. App. 72.

Petitioner raised this claim in his federal habeas petition. App. 62. The district court adopted the report of the magistrate which noted petitioner failed to show the state court's finding of a lack of evidence of immunity was objectively unreasonable nor presented clear and convincing evidence to rebut the presumptive correctness of the finding. App. 3, 16.

Since the report noted that even if there was "some evidence suggesting an ill-defined promise to Benavides," petitioner objected to this finding as it was not considered together with all other errors in his trial as required under

clearly established federal law. App. 33-34.

b. Evidence of contradicting D.E.A. reports and witnesses and contradicting statements made to the prosecutor just before trial commenced.

As trial began, the prosecutor advised the court:

> The fact in my discussions with Mr. Benavides he has indicated to me extensively his drug relationship with [petitioner] and the entire Rios family, and the fact that he was a drug courier and was bringing across the border significant amounts of heroin in quantities amounting to as many as ten kilos every week...¶... The court knows that based on the reporter's transcript, that was a subject that was broached by the attorneys during the preliminary hearing.[2] ¶ That will be mentioned and discussed during opening statement. These are conversations obviously that were had between Mr. Benavides and Mr. Rios and Mr. Benavides was in fact working as a courier for Mr.

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[2] The prosecutor was mistakenly referring to Benavides' preliminary hearing testimony where he testified he asked petitioner for a loan or claimed petitioner owed him $22,000. App. 96-98. However, Benavides never referred at the preliminary hearing to the moneys in a drug dealing context. The prosecutor's trial statements when trial started were the first petitioner heard of the drug dealing tie-in.

> Rios that entire time which led up to the debt of forty thousand owed by Mr. Rios to Mr. Benavides..... App. 100.

The prosecutor told the jury the $40,000 debt was due to Benavides paying a Mexican official $20,000 to get petitioner out of jail after a drug arrest and because Benavides worked for petitioner as a drug courier incurring a $20,000 debt. Therefore, Benavides sought petitioner to cover the insufficient funds check. App. 82.

Benavides testified he had worked from 1974 through early 1978 for petitioner dealing marijuana and cocaine in Mexico without being paid for a year and a half. Once petitioner smuggled cocaine into the U.S. Benavides testified he also lent petitioner in Mexico $20-22,000 to get him out of jail or pay a fine. Due to these debts Benavides sought petitioner to raise money. App. 41.

During the state habeas hearing, two D.E.A. reports which impeached Benavides' statements came to light. In February, 1981 when agent Ford asked Benavides if he knew anything about petitioner and his family's drug business, "Benavides denied any knowledge about it." App. 116. Ford's August 18, 1981 D.E.A. report contained material impeachment:

> 1. Subject BENAVIDEZ stated he was willing to discuss the GONZALES-Rios Brothers, however, claimed he had no direct involvement with them and had not had any contact with them for approximately five years.

2. He stated that he was aware that they were trying to kill him and he felt that it was because he had abandoned his wife and family prior to her murder.
3. BENAVIDEZ claimed that the brothers did not trust him enough to involve him in their business dealings but knew they were dealing heroin and knew many of their friends including Jose IRIARTE-Torres. He denied any narcotic activity on his part.
4. BENAVIDEZ could provide no useful information to this investigation at this time and would only discuss matters prior to 1975. App. 118-19.

During the state habeas hearing, Det. Hammaker revealed Benavides, just before he testified, told him and the prosecutor that the money he'd earned was from washing dishes, before he claimed the money was from drug trafficking:

> It was my understanding from Mr. Ramirez [the prosecutor] that he talked to ... Benavides just before [he] went on the stand. And that was the first time that he had told any of us that there was a question about $20,000 or some other amount of money that was lent to [petitioner] that was owed to him. And when he was questioned about where this money came from, and he said he got -- saved it washing dishes. And it wasn't until that point in time when [the prosecutor] was interviewing him, prior to

> going on the stand, and I was not present, that he admitted to [the prosecutor] that it was from muleing dope, or trafficking drugs. App. 145.

Benavides also told Hammaker the " money that he had saved [was] from washing dishes in restaurants." Hammaker recalled this evidence 16 years later but there was no report. Hammaker could not explain why he did not remind the prosecutor that these statements as to the source of the money of the supposed debt were inconsistent with what the prosecutor was telling the judge and jury at that very time but "[the prosecutor] already had that information. He apparently didn't believe that. And he is the one that actually questioned [Benavides] about it." Hammaker admitted that out of the "voluminous interviews" taped and otherwise consuming over 50 to 100 pages with Benavides that this newly revealed information had never come up or was ever written down. Hammaker felt the prosecutor was "not buying the fact that [Benavides] saved $20,000 washing dishes. And he wanted the facts straight before he put David on the stand." Benavides never told Hammaker about drug dealing. App. 144-49.

Petitioner raised this claim in his federal habeas petition. App. 64. The report recommended this claim be denied. It relied on the state court report that these new statements were not exculpatory, favorable or material to the defense since Benavides was thoroughly impeached on many fronts, including the extent of his drug dealing, that his self-serving denials were not material since defense counsel's strategy was to impeach Benavides' credibility

with admitted involvement in drug dealing, and it was not objectively unreasonable to find that the statements that he earned his money dish washing and not drug dealing was not material exculpatory evidence. App. 20. Petitioner objected to the report's singular analysis of each claim whereas clearly established federal law required that all claims be analyzed cumulatively. App. 33. The district court adopted the magistrate's report. App. 3.

2. **Trial counsel was ineffective which prejudiced petitioner's defense.**

Petitioner alleged in state court he was denied due process, a fair trial and the effective assistance of counsel on 6 claims: that counsel a) failed to investigate evidence that Benavides knew or had access to an $18,000 Mexican bank account before he crossed the border after his release from prison; b) failed to investigate the whereabouts of the supposed assailant who shot Benavides, Manuel Bueno; c) failed to impeach Benavides with inconsistent statements made during a polygraph examination; d) failed to present evidence the prosecution's getaway car was not the same one as the prosecution photos entered into evidence; e) failed to file a motion in limine to limit drug testimony; and f) failed to object to a witness who testified he "feared" petitioner when that fear was based upon what a police officer had told the witness. The state evidentiary hearing dealt solely with the $18,000 bank account claim and did not decide the remaining five. Petitioner realleged the six claims in the state appellate courts and in his federal habeas petition. App. 69.

a. Counsel was aware of but failed to

investigate the $18,000 Mexican bank account which would have impeached Benavides' motive in seeking out petitioner.

Benavides' estranged wife had an $18,000 bank account certificate of deposit in Mexico with a son as co-signer. The wife was murdered on October 31, 1980 while Benavides was in the Mexican prison. Before Benavides was released and before he was shot he knew of the existence of the bank account. The account's existence was known to trial counsel as it was disclosed by Tarango (who disappeared before the trial) to the prosecution in February, 1982, six months before petitioner's trial. The state court found there were many explanations why, even if he had been questioned about the account, such evidence would "not totally undermine Benavides' motive for contacting the petitioner:" Benavides didn't have immediate access to an un matured CD, the money was meant for his children, Benavides was a suspect in his wife's murder and taking this money would make him more of a suspect. Counsel was not ineffective for failing to conduct the investigation because there was no reasonable probability the evidence would have effected the result. App. 70-71.

However, at the hearing petitioner presented a former Mexican bank manager who testified that it was quite easy to bring the co-signer son to Tijuana to close the account or even quickly borrow against the principal. App. 43, 47.

The report cited the state court's reasoning that Benavides could have accessed the account but "not

quickly." It adopted the state court finding that Benavides paid the bad check and did not go down to Tijuana until 1982 to close the account. The report found no prejudice since the the account, if known, did not "significantly discredit Benavides' testimony." App. 17-19.

Petitioner objected that the evidence showed that Tarango was actually the person who provided the check to the attorney, not Benavides; that the previously concealed D.E.A. report showed Benavides put his deceased wife's Oxnard home on the market in March, 1981, hardly reflecting any fear of drawing suspicion on himself in her murder and that Benavides sold the house in July, 1981. App. 47. The district court adopted the report. App. 3.

For motive, the California court of appeal noted that "Benavides was desperately searching for $5,000 to pay his attorney following his release from prison." App. 82, 87.

b. Counsel failed to locate and call the alleged assailant Bueno.

Petitioner alleged in his state petition that trial counsel was ineffective for failing to locate Bueno who was living openly with his family during 1981 and 1982 in Lawndale, about 18 miles from the Santa Ana courthouse. The state's ignored this claim in deciding the writ. App. 68. Petitioner raised this claim in his federal writ. App. 65.

Bueno declared he made no attempts to conceal

himself or where he lived for eight years from 1981. He, his wife and children lived in Lawndale in 1981 and no one came looking for or asking about him. He maintained a valid California drivers license, received mail from the I.R.S., and was a member of a union. Buenc was not present when Humberto Perez or Benavides were shot on February 5, 1981 and knows no one involved in the shooting. App. 110-11.

Assuming counsel found Bueno, the report found petitioner had "not demonstrated the importance of the accuracy and reliability of Benavides' identification of Bueno as the second shooter." The report found that even if it were assumed the jury would have distrusted Benavides "more" if he were shown to be unconvincing as to his identifications of both shooters, the state court reasonably could have found to the contrary, since even if the reviewing court might find error, habeas relief is not warranted where state court denial of a claim is "at least reasonable." App. 22.

Petitioner objected to the report's citation to a state court denial since the state court never addressed the claim. Therefore, no deference was due to any state court finding and no presumption could be made that trial counsel's conduct fell within the range of professional competence. App. 44-46. The district court adopted the report. App. 3.

c. Counsel failed to impeach Benavides with inconsistent statements made during a polygraph examination.

Petitioner claimed that trial counsel was ineffective in failing to impeach Benavides with inconsistent statements made, or not made, during a polygraph examination. Like the Bueno claim, this claim, although raised, was never considered in the state court on any level. App. 48.

In a polygraph exam transcript Benavides said: 1) he asked his wife to send him $1,000, not the $5,000 he claimed at trial he was "desperately" seeking from petitioner; 2) he did not want to see anyone in Rios' family although he'd earlier said he was seeking petitioner for money at the same time; 3) it cost $10,000, not $5,000 to get out of jail; 4) Tarango could raise money by selling his interest in their bar; 5) identified another person as the assailant; and 6) did not say he was trying to repay anyone. App. 23-24.

The report found, while conceding "these statements may have contradicted some of Benavides' statements at trial, the state courts reasonably could have determined that Petitioner failed to demonstrate prejudice from any failure by counsel to use them to impeach Benavides....`The trial was replete with impeachment'" and whatever further impeachment was caused by the introduction of these statements could not have created a reasonable probability of a more favorable result for petitioner." App. 24.

Petitioner objected as 1) 28 U.S.C. § 2254(d), cited by the report, did not apply, since, like the Bueno and following claims, the state court never considered it and no deference was owed, and 2) the errors were not considered

cumulatively with the other errors which is necessary in determining ineffective assistance claims. App. 48. The district court adopted the report. App. 3.

d. Counsel failed to present evidence the alleged "getaway" car was not in any way similar to the car petitioner was photographed standing next to.

Petitioner claimed counsel was ineffective for his failure to present evidence the alleged "getaway" car described by two witnesses was not the same vehicle as shown in prosecution photographs. App. 49. Witnesses Mossey and Boege described a late model four-wheel Bronco or Blazer-type, possibly with pin-striping, or a possibly dark 4 wheel drive pickup truck leaving the shooting scene. Police reports reflected these descriptions. The prosecution had introduced photographs of petitioner standing next to a light-colored four wheel drive Japanese truck but never asked the two witnesses if the vehicle petitioner was standing next to was the same or similar vehicle they had seen that evening or showed them the photographs. Trial counsel never used the police reports to refresh the recollections of the witnesses. At trial one and half years later, the two could not recall any details of the vehicle. Petitioner alleged counsel's performance was deficient in that he failed to follow this rudimentary rule of evidence. App. 49.

The report erroneously found that petitioner had argued that the photographs showing him standing next to the 4-wheel drive was "consistent" with the "getaway car" described at trial. In fact, petitioner argued the opposite: the witness' descriptions showed the vehicles were *not* the

same. The report found that even if the impeachment evidence were used, it "did not significantly contravene their statements recorded in the police report. To the contrary, the reports were not intended to "contravene" the witness' trial testimony; they were meant to *enhance it and make it accurate*. The witnesses professed a lack of recollection, not false testimony. Any refreshment would only have strengthened their testimony. The report found even if the statements "contravened" the trial testimony, they were not so clearly divergent they would have demonstrated the truck in the photos was not the one described that night. To the contrary, the statements would have established no tie to petitioner. The report found even if the witnesses did not "clearly describe" the truck in the photographs, any connection of the truck to petitioner was "not critical" to the state's prosecution, or the state court reasonably "could have" found as much and thus found petitioner was not prejudiced by his counsel's actions. App. 24-26.

The report believed this claim involved "impeachment". To the contrary, petitioner argued the ineffective assistance lay in a failure to present evidence. Petitioner objected to this erroneous finding and to another that (although the state court never considered this claim) the report made a predictive finding of what that court "could have found." App. 26. The district court adopted the report. App. 3.

e. Counsel failed to file a motion in limine to limit drug testimony about *petitioner*, not Benavides.

Petitioner failed to file a motion in limine to limit

drug testimony about *petitioner*, not Benavides. Citing the state court of appeal opinion, the report rejected this claim since evidence labeling Benavides a drug dealer, though risky, was necessary to impeach him. App. 26-27. Petitioner objected, arguing there was no "trade-off" in allowing Benavides to testify petitioner was in a Mexican jail and that he helped pay his way out. This evidence did not impeach Benavides' drug dealing; it established petitioner's bad character. Clear and convincing evidence of deficient performance was established when counsel admitted he forgot to seek a limiting instruction: "It went right over my head."App. 50. Forgetting to perform competently is not a trial tactic.

f. Counsel failed to object or explain when a witness said he "feared" petitioner when that fear was based on what an officer had told the witness.

Pedro Perez was called by the prosecution to state petitioner called him ostensibly looking for a phone number for Benavides. Perez testified he had denied to police knowing petitioner. Perez told the court in chambers his denial was because "the investigators told me he was very dangerous, then I thought about my family and I have a lot of children." The prosecutor claimed he "wasn't aware of that statement" and stated he would only ask Perez the reason for the denial was because he "was afraid. That he can simply answer yes or no. I won't pursue it any further." Based on this assurance the court allowed the question. However, before the jury the prosecutor changed the question to, "Mr. Perez, did you deny knowing Mr. Rios because you were concerned for your family?" Perez said, "Yes, my family." App. 101-06.

.Petitioner's counsel made no objection at this point or sought to explain the basis for his fear. This is the trial error of which petitioner has claimed throughout his writs.

The report found that since counsel did object at the bench conference his representation was objectively reasonable and the state court could reasonably deny this claim. App. 28. Petitioner argued the gravamen of his objection was what happened *after* the chambers discussion as mentioned above. App. 51-2. The district court adopted the report. App. 3

3. **Petitioner is actually innocent.**

Petitioner claimed he was actually innocent and the state court never addressed the raised claim or heard his evidence. App. 65 . In addition to the errors asserted above, petitioner submitted the Bueno declaration (App. 110), the putative missing defendant; a declaration of Jesus Castillo, (App. 113) the former co-defendant who was acquitted, and a letter from Benavides explaining he implicated petitioner because he was very angry, upset, depressed and received constant pressure from the prosecution to blame him. Benavides was not sure petitioner is the person who called him. App. 65.

The report rejected the declarations, noting that even if true, they would not demonstrate innocence and are not "compelling evidence." App. 30. No evidentiary hearing was held. Petitioner objected that the report's finding of compelling evidence is not the correct legal standard; rather, petitioner must show that it is more likely than not that no reasonable jury would have found him

guilty beyond a reasonable doubt. Petitioner objected that clearly established law required the district court to consider the probative force of all relevant evidence which was either excluded or *unavailable* at the time of trial, along with evidence improperly admitted as required by *Schlup v. Delo*, 513 U.S. 298, 327 (1995). App. 53. The district court adopted the report and denied a certificate of appealability on all claims. App. 3.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. PETITIONER IS ENTITLED TO A CERTIFICATE OF APPEALABILITY ON EACH CLAIM PRESENTED.

This case merits review for a number of compelling reasons. First, the Ninth Circuit's denial of a certificate of appealability ("COA") on each claim and sub-claim conflicts sharply with relevant decisions of this Court, particularly *Tennard v. Dretke*, __U.S. __, 124 S.Ct. 2562 (2004), *Miller-El v. Cockrell*, 537 U.S. 322 (2003), *Slack v. McDaniel*. 529 U.S. 473 (2000) and *Barefoot v. Estelle*, 463 U.S. 880 (1983) and how the claims are considered consistent with the constitutional rules set forth in *Kyles v. Whitley*, 514 U.S. 419 (1995), *United States v. Bagley*, 473 U.S. 667 (1985), *Brady v. Maryland*, 373 U.S. 83 (1963), and *Strickland v. Washington*, 466 U.S. 668 (1984) which require all due process and ineffective assistance of counsel sub-claims to be analyzed cumulatively and not separately from each other as to their respective issue.

Second, regarding four of petitioner's ineffective

assistance of counsel claims, of which the state courts never considered their facts or applicable federal law (locating Bueno, Benavides' polygraph statements, "getaway car" evidence, and failure to object/explain Perez' fear of petitioner), the Ninth Circuit's denial of a certificate of appealability conflicts with relevant decisions of this Court, particularly *Price v. Vincent*, 538 U.S. 634 (2003) and *Williams v. Taylor*, 529 U.S. 362 (2000), since these decisions require federal review of a reasoned state court decision to determine whether 1) a claim was adjudicated on the merits, and if so, 2) whether it resulted in a decision contrary to, or involved an unreasonable application of, clearly established law as determined by this Court, or 3) it resulted in a decision that was based on an unreasonable determination of the facts in the light of the evidence presented in the state court "proceeding. 28 U.S.C.§2254(d). In denying these four claims, the report merely cites §2254(d) and several case without referring to any state adjudication on the merits. The report makes predictive determinations that the state court "could have found to the contrary" or "reasonably could have found as much" or "reasonably denied this claim", analyses which never occurred as there was no reasoned state decision with which to compare. Third, although the court excused counsel's various errors as trial tactics, no reasonable counsel would have made the same decisions when provided with the formerly concealed evidence which came to light during the evidentiary hearing,

Fourth, Petitioner is entitled to a COA as he has made a substantial showing of the denial of a constitutional right on each claim. 28 U.S.C. § 2253(c)(2). This threshold showing is "relatively low." *Jennings v.*

Woodford, 290 F.3d 1006, 1010 (9th Cir. 2002), *cert. denied*, 539 U.S. 958 (2004). In order to obtain a COA, petitioner is not required to show he should prevail on the merits nor to prove that some justices would grant his habeas petition. A claim can be debatable even though every jurist of reason might agree, after a COA has been granted and the case has received full consideration, that petitioner will not prevail. *Miller-El, supra*, 537 U.S., at 337-38; *Barefoot , supra*, 463 U.S., at 893, n. 4. The "question is the debatability of the underlying constitutional claim, not the resolution of the debate." *Miller-El, supra*, 537 U.S. at 342.

II. PETITIONER HAS MADE A FACIAL CONSTITUTIONAL SHOWING THAT HE WAS DENIED DUE PROCESS AND A FAIR TRIAL WHEN MATERIAL IMPEACHMENT EVIDENCE WAS WITHHELD FROM HIM.

The successful prosecution of petitioner was entirely dependent on Benavides' credibility. Other than the two assailants, Benavides was the sole witness to the shootings. After the preliminary hearing, the magistrate, after observing Benavides testify for two days, succinctly stated the issue: "this is a case in which your primary witness may be a liar. That's what the case is all about, and he may not be." App. 98.

The violation of Petitioner's *Brady* rights is even more egregious than the violations set forth in *Kyles* where there were four eyewitnesses (three of whom picked Kyles from a photo lineup) and a questionable informant who implicated the defendant as the murderer. Despite the

strength of the prosecution witness evidence, and the fact that crime evidence was found in Kyle's apartment, "[d]isclosure of [the witness'] statements would have resulted in a markedly weaker case for the prosecution and a markedly stronger one for the defense." *Kyles*, 514 U.S., at 441, 451. Although the report cited *Brady*, *Bagley*, and Kyles, in support of the state court opinion which cited *Brady*, the decision of no *Brady* violation was contrary to, or involved an unreasonable application, clearly established federal law as explicated in *Kyles*.

The report cited the state court's improper weighing of the quantum of new impeachment evidence with the impeachment evidence produced at trial, concluding the new evidence was not material. App. 75. This finding resulted in a decision contrary to, or involved an unreasonable application of *Kyles*. "[A] showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant)." *Id.*, at 434, 435, n. 8. Materiality is not a sufficiency of the evidence test.

> A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict...[a *Brady* violation is established] by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in

the verdict." *Kyles*, 514 U.S., at 435.

The report downplays the significance of the newly discovered statements. While telling the prosecutor petitioner owed him money from drug dealing, he also told him he legally earned his income and had a legitimate dish washing job, not as a drug dealer. The prosecutor refused to believe the non-incriminating statements and never divulged them to the defendant.[3] Contrary to his trial testimony, he'd told the D.E.A. twice the year before he knew nothing about petitioner's alleged drug business, was not involved with him for the previous five years (which impeached his time line of involvement with petitioner), made an effort to stay away due to fear petitioner's family thought he'd abandoned his motherless children, denied being involved in drugs himself, and only talked about matters occurring before 1975 (six years instead of five), again impeaching his trial time line. App.115-19. The report also failed to recognize that there now existed at

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3. The prosecutor may have been knowingly using false testimony which would corrupt the truth-seeking function of the trial process. *United States v. Agurs*, 427 U.S. 97, 103-04 (1976); *Giglio v. United States*, 405 U.S. 150, 154 (1972); *Napue v. Illinois*, 360 U.S. 264, 269 (1959)(false testimony going to credibility of witness). In view of the fact that the evidence came from a homicide detective and was spontaneous, there can be no serious argument but that it was false. The report's gratuitous surmising that the comment was made in "jest" (App. 76) bore no support in the record. The report's claim there was no "foundational proof" is also without merit as Hammaker was relating conversations he had directly with the prosecutor and Benavides.

least four witnesses who could impeach Benavides: the two D.E.A. agents, the homicide detective and the prosecutor.

The report minimizes the importance of the concealed reports, noting counsel in his opening *statement* said Benavides had denied drug involvement with petitioner's family. App. 19. This, of course, being a statement, was not evidence. More importantly, the report minimizes the importance of the concealed reports by claiming they were "not material to the defense because defense counsel's strategy was to impugn Benavides' credibility with his admitted involvement in illegal drug dealing." App. 20. The report is grossly in error as there is no telling *what* counsel's strategy *would have been* if he were apprised of the concealed reports and the statements made to Benavides that he would not be prosecuted for his drug dealing. The entire thrust of the defense would necessarily change when the new evidence is factored in.

Petitioner is entitled to a COA on the "promises" issue as the report resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d)(2). The report framed petitioner's claim that he had an immunity "agreement" with state or federal agents. App. 14. However, petitioner claimed Benavides received promises of non-prosecution. App. 34. The report did not find Benavides' testimony not credible; rather it found no "immunity agreement", or contract, was entered into. Benavides was criticized for not remembering the "specifics regarding any promise" (App. 15) although in all his interviews he consistently and specifically said he

would not be prosecuted for talking about his and petitioner's drug dealings. Benavides was concerned about his own criminal liability and such a promise would ease his concerns. These are clearly impeachment statements would have been devastating to Benavides. If defense counsel knew this information, it would have impacted the defense strategy and made available more impeachment witnesses. The report resulted in a decision that was contrary to, or involved an unreasonable application of clearly established law since it considered this issue alone and not cumulatively with other impeachment and concealed evidence claims. For materiality purposes all the suppressed evidence be considered "collectively, not item-by-item." *Kyles., supra*, 514 U.S., at 436. The report was objectively unreasonable.

III. PETITIONER HAS MADE A FACIAL CONSTITUTIONAL SHOWING THAT HIS TRIAL COUNSEL WAS INEFFECTIVE AND MANY OF HIS CLAIMS WERE NEVER ADDRESSED

As noted above at p. 21, four of petitioner's ineffective assistance of counsel claims were never adjudicated on the merits in state court. The report simply decides the state court could have reasonably denied them without any support from any state decision as to what it actually did. A rote citation to § 2254(d) is not sufficient to prove the state court adjudicated theses claims on the merits. The state court of appeal decision and state report did not mention these claims. Section 2254(d)(1) and (2) are therefore inapplicable to these claims. There is no way for the federal court to "look through" unexplained

denials because it would be a fruitless search since there were no opinions. *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991). At a minimum, petitioner is entitled to a COA on these claims.

The report adopts the state court's reasoning that Benavides' admitted knowledge of the $18,000 bank account when he crossed the border would not have undermined his testimony that he needed to contact petitioner quickly to obtain money. App. 19. This is an unreasonable determination of the facts in light of the evidence presented in the state court. §2254(d)(2). The state court's findings were internally inconsistent. Although the state found Benavides "knew of the existence of an $18,000 two-year " CD, it then found he didn't know how much money was there. Although it found Benavides didn't have time to get the funds, evidence showed it was easy to borrow against the CD. Although the state found Benavides paid the "rubber check", it was actually Tarango. Although the court found Benavides didn't want to draw suspicion to himself as a possible murder suspect, the D.E.A. reports showed the month after he crossed the border he put his wife's home on the market. Although he court found he was released from the hospital in 1982, it occurred in February, 1981, immediately after the shooting when he then went into police "protective custody" at the Anaheim jail.

The finding that knowledge of the bank account did not undermine Benavides' credibility or the prosecution's case is a decision contrary to, or involved an unreasonable application of, clearly established law. §2254(d)(1) for two reasons. First, the appeals court found the need to get

money was Benavides' *only* motive for "desperately searching" for petitioner. To bring to the jury's attention that Benavides knew or had access to over three times the alleged amount would have severely impeached him. The jury would be able to judge for itself whether Benavides' motive was credible. Without the evidence, the jury could only conclude his explanation was the only one. Second, despite petitioner's request, the report failed to analyze this claim, which it recognized existed but refused to give it sufficient weight by itself, with all other claims cumulatively as required by clearly established Federal law. *Strickland, supra*, 460 U.S., at 694. Only in this way can the proceedings be found to be unreliable "even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id, see also, Alcala v. Woodford*, 334 F.3d 862, 883, 888-89 (9th Cir. 2003).

The report's finding that petitioner's failure to object to other crime evidence was an appropriate trial tactic due to the trade-off to show Benavides was a heroin trafficker (App. 26) is a decision based on an unreasonable determination of the facts in light of the evidence at the state court proceeding.§2254(d)(2). Assuming evidence tying Benavides into petitioner as drug dealers would be an acceptable trade-off, evidence showing petitioner was in a Mexican prison and needed money to buy his way out was *not*. An attorney must object to prejudicial evidence. *Glasser v. United States*, 315 U.S. 60, 72-76 (1942).

IV. PETITIONER IS ACTUALLY INNOCENT.

As noted above at pp. 20-21, Bueno and Castillo

swear they were not present or involved. Benavides admits he does not think petitioner is the person who called him that night. Petitioner objected to the report's requirement that in order to prevail on an actual innocence claim. he must submit "compelling evidence." This is an incorrect legal standard.

The requisite standard is "petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Schlup*, 513 U.S., at 327. The emphasis is on reviewing all the evidence in totality, contrary to what the report did in rejecting this claim. The court must "consider the probative force of relevant evidence that was either excluded or unavailable at trial." *Id.*, at 327-28. Including the now available Bueno and Castillo unequivocal testimony and Benavides' recollections, excluding the various objections referred to in his ineffective assistance claim, and presenting the full picture on such witnesses as Pedro Perez, Mossey and Boege, *no* reasonable jury would convict petitioner. That is all that is required. The report attempts to cast doubt on the two declarations but that is not what *Schlup* requires to determine this claim. Petitioner has never been accorded a hearing on this claim. But it is beyond cavil there are now available at least two powerful witnesses to establish a reasonable doubt. Petitioner is entitled to a COA.

CONCLUSION

A writ of certiorari should issue to review the important issues raised herein and that a certificate of appealability be granted on all claims and sub-claims.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 04-56691
D.C. No. CV-01-00319-GLT(JWJ)
Central District of California,
Santa Ana

GENARO GONZALEZ RIOS,

Petitioner-Appellant,

v.

DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

ORDER

Before HUG and GRABER, *Circuit Judges.*

The request for a certificate of appealability is denied. *See* 28 U.S.C. § 2253(c)(2).

DATED: February 22, 2005.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 04-56691
D.C. No. CV-01-00319-GLT(JWJ)
Central District of California,
Santa Ana

GENARO GONZALEZ RIOS,

Petitioner-Appellant,

v.

DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

ORDER

Before: GOULD and BYEBEE, Circuit Judges.

Appellant's "Petition for Rehearing and Petition for Rehearing En Banc," filed March 8, 2005, is construed in part as a motion for reconsideration. So construed, the motion is denied. *See* 9th Cir. R. 27-10. The petition for rehearing en banc is denied on behalf of the court. *See* 9th Cir. Gen. Ord. 6.11.

No further filings shall be accepted in this closed case.

DATED: March 22, 2005

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA-
WESTERN DIVISION

GENARO GONZALEZ RIOS, Petitioner,	Case No. SACV 01-319-GLT (JWJ)
v. DEPARTMENT OF CORRECTIONS, Respondent.	**ORDER DENYING PETITION FOR ISSUANCE OF CERTIFICATE OF APPEALABILITY**

On September 2, 2004, petitioner filed a Petition for Issuance of a Certificate of Appealability. 28 U.S.C. 2253; Fed. R. App. P. 22(b).

For the reason stated in the report and recommendation of the magistrate judge (filed on August 4, 2004) and the order accepting the report and recommendation (filed on August 26, 2004), the Court finds that petitioner has not made a substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253(c)(2); Fed. R. App. P.22(b).

IT IS THEREFORE ORDERED that the Petition for Issuance of a Certificate of Appealability is DENIED.

DATED: September 15, 2004

/s/ Gary L. Taylor
GARY L. TAYLOR
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

GENARO GONZALEZ RIOS, Petitioner, v. DEPARTMENT OF CORRECTIONS, Respondent.	Case No. SACV-01-319-GLT (JWJ) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Gary L. Taylor, United States District Judge, by United States Magistrate Judge Jeffrey W. Johnson pursuant to 28 U.S.C. § 636 and General Order 01-13 of the United States District Court for the Central District of California. For the reasons discussed below, it is recommended that the Petition be denied and the action be dismissed with prejudice.

I.
PROCEDURAL HISTORY

On August 6, 1982, an Orange County Superior Court jury convicted Petitioner Genaro Gonzalez Rios of one count of first degree murder while lying in wait and one count of attempted first degree murder while lying in wait. (Cal. Penal Code §§ 187(a), 664, 192(a)(15)). Clerk's Transcript ("CT") 366-70; Reporter's Transcript ("RT") 2930-31.) After a penalty phase hearing, the jury recommended life in prison without possibility of parole and the court

imposed that sentence on November 18, 1982. (CT 376-77; RT 2953-3058, 3084.) Petitioner filed a petition for writ of habeas corpus in the Orange County Superior Court which the court denied on June 9, 1983. (Respondent's Lodgment No.17.) The California Court of Appeal affirmed Petitioner's conviction and denied habeas relief on March 30, 1984. (Respondent's Lodgment No. 2.) The California Supreme Court denied review in 1984. (Petition, at 4.)

Petitioner filed a second petition for habeas relief in the Orange County Superior Court on January 26, 1986 which the court denied in April 1986. (Petition, at 4; see also Respondent's Lodgment No. 3, at 7.) On March 17, 1987, Petitioner filed a habeas petition in the California Court of Appeal which the court denied on May 7, 1987. (Respondent's Lodgment No. 3.) Petitioner filed a habeas petition in the California Supreme Court on December 19, 1988 which the court denied on March 16, 1989. (Respondent's Lodgment No. 4.)

On August 8, 1995, Petitioner filed a third habeas petition in the Orange County Superior Court which the court denied on November 13, 1995. (See Petitioner's Lodgment Nos. 1-3, 4, at 4.) Petitioner filed a third habeas petition in the California Court of Appeal on October 11, 1996. (Respondent's Lodgment No. 5.) The Court of Appeal issued an order to show cause and remanded to the Superior Court for further proceedings. (Id.) The Superior Court held an evidentiary hearing and eventually, on September 3, 1998, denied the petition. (See Respondent's Lodgment Nos. 6, 13-16; Petitioner's Lodgment No.18.)

Petitioner contacted the California Court of Appeal on December 8, 1999 inquiring about the

habeas proceedings previously referred to the Superior Court and on March 2, 2000, the Court of Appeal informed Petitioner that it no longer had jurisdiction in those proceedings. (Respondent's Lodgment No. 7.) Petitioner failed to file a timely petition for review or other application for relief in the California Supreme Court. (See Respondent's Lodgment No. 9.)

On March 12, 2001, Petitioner filed the present Petition for Writ of Habeas Corpus in this Court. The Court recommended granting Respondent's motion to dismiss the Petition, but upon reviewing Petitioner's Objections and other documents, vacated that recommendation. On March 13, 2003, the Court denied Respondent's motion to dismiss the Petition and ordered Respondent to answer the merits of the Petition. Respondent filed an Answer on August 18, 2003 and Petitioner filed a Traverse on December 22, 2003. Thereafter, the Court determined Respondent's answer to be incomplete and ordered Respondent to file a supplemental answer, which Respondent did on February 6, 2004. Petitioner filed a Supplemental Traverse on March 2, 2004.

The Court now recommends that the Petition be denied on its merits, as explained below.

II.
PROCEDURAL DEFAULT & EXHAUSTION

Respondent asserts that certain of Petitioner's claims are procedurally defaulted and/or unexhausted. For reasons of judicial economy, and because each of the claims fails on its merits, the Court recommends denial of the Petition on its merits. See Lambix v. Singletary, 520 U.S. 518, 524, 117 S.Ct. 1517, 137 L.Ed.2d 771

(1997) ("We do not mean to suggest that the procedural bar issue must invariably be resolved first; only that it ordinarily should be."); Walters v. Maass, 45 F.3d 1355, 1360 n.6 (9th Cir. 1995) (noting that where a claim fails on the merits, interests of comity and judicial economy may be better served by addressing the claim on the merits); 28 U.S.C. § 2254(b)(2) (unexhausted claims may be denied on their merits).

III.
STANDARD OF REVIEW

The Court reviews the Petition under the Anti-Terrorism and Effective Death Penalty Act (AEDPA"), which provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254. Under the AEDPA, a federal court shall presume that a determination of factual issues

made by a state court is correct, and Petitioner has the burden of rebutting that presumption by clear and convincing evidence. 28_U.S.C. § 2254(e)(1). The presumption of correctness applies to findings of state appellate courts as well as trial courts. Bragg v. Galaza, 242 F.3d 1082,1087 (9th Cir. 2001) as amended, 253 F.3d 1150.

The Supreme Court has explained the standard of review under the AEDPA as follows:

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams v. Taylor, 529 U.S. 362, 412-13, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). A state court's decision is an "unreasonable application" of Supreme Court precedent if it is "objectively unreasonable" which "requires the state court decision to be more than incorrect or erroneous." Lockyer v. Andrade, 538 U.S. 63, 75, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003); Ortiz-Sandoval v. Clarke, 323 F.3d 1165, 1169-70 (9th Cir. 2003). Thus, "an unreasonable application is different

from an incorrect one." Bell v. Cone, 535 U.S. 685, 694, 122 S.Ct. 1843, 1850, 152 L.Ed.2d 914 (2002); accord Price v. Vincent, 538 U.S. 634, 643, 123 S.Ct. 1848, 1854-55, 155 L.Ed.2d 877 (2003) (even where reviewing court might find that error occurred, habeas relief is not warranted where state court denial of claim is "at least reasonable").

Under the AEDPA, circuit law may be "persuasive authority for purposes of determining whether a particular state court decision is an 'unreasonable application' of Supreme Court law." Davis v. Woodford, 333 F.3d 982, 990-91 (9th Cir. 2003). However, only the Supreme Court's holdings need be reasonably applied by the state courts under the AEDPA. Andrade, 538 U.S. at 71-72.

In reviewing a habeas petition, the Court will examine, where applicable, an explicated lower state court opinion under the AEDPA where the California Supreme Court opinion denies the same claims without discussion because "where there has been one reasoned state court judgment rejecting a federal claim, [federal habeas courts should presume that] later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." Ylst v. Nunnemaker, 501 U.S. 797, 803, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991); see also Shackleford v. Hubbard, 234 F.3d 1072, 1079 n.2 (9th Cir. 2000) (noting that habeas courts "look through" unexplained denial by the California Supreme Court to review explicated California Court of Appeal opinion).

IV.
FACTS UNDERLYING CONVICTION

The California Court of Appeal found the

following facts underlying Petitioner's conviction:

> [Attempted murder victim David] Benavides in early February 1981 found himself imprisoned on drug charges in La Mesa prison, Tijuana, Mexico. Whether through bribery or lawful means, he was released following payment of $5,000 to his attorney. The payment, however, was by check drawn on an account without sufficient funds.
>
> Immediately after his release from prison, Benavides and his business partner, Abel Tarango, drove across the Mexican-American border and Benavides began a search for money to cover the check. Since [Petitioner] owed Benavides $40,000 from a prior loan (to free [Petitioner] from a Mexican prison) and unpaid wages (as [Petitioner's] drug courier), Benavides placed a number of telephone calls to [Petitioner's] relatives attempting to find him. Tarango eventually drove Benavides to a home of a relative, [murder victim] Humberto Perez, in Placentia, to await a call from [Petitioner].
>
> [Petitioner] called the following day telling Benavides he could raise only $3000 and was sending the money to Benavides with Juan Castillo and Jose Bueno. Later that night, Castillo phoned Benavides, telling him he and Bueno, nicknamed Bala or the bullet, were lost and asked Benavides to meet them at a street corner in Anaheim. Humberto Perez drove Benavides to the

corner where they parked. Bueno and another person[1] walked to the car, Bueno going to the passenger side where Benavides sat. Pleasantries were exchanged until Bueno said, "Genaro went up," removed a gun from inside his jacket, and fired a number of times striking Benavides in the hands and thigh.

Witnesses who heard the shots saw a four wheel drive truck speed away. The car containing Perez and Benavides burst into flames. Firemen found Benavides injured and Perez dead from eight bullets.

Six months later Castillo and [Petitioner] were arrested at Castillo's home in Los Angeles. Parked outside was a four wheel drive truck.

[Petitioner's] defense consisted primarily of evidence suggesting Benavides' business partner, Tarango, had both motive and opportunity to commit the murders. Tarango was a partner with Benavides in a number of bars with his interest reverting to Benavides upon death. It was additionally pointed out Humberto Perez drove Benavides to meet Bueno and Castillo only after Tarango mysteriously disappeared. Finally, Tarango was aware of the negotiations between [Petitioner] and Benavides and was therefore in a position to "set Benavides up" and

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1. Castillo was tried jointly with [Petitioner] but was acquitted. Bueno had not been aprehended.

"frame" [Petitioner].

(Respondent's Lodgment No. 2, at 2-4) (footnote in original.)

V.
PROSECUTORIAL MISCONDUCT

Petitioner contends that the prosecutor committed misconduct by failing to disclose evidence to the defense, specifically: (1) Benavides was given immunity for his testimony; (2) Benavides had access to a bank account containing $18,000; and (3) Benavides denied involvement with Petitioner's drug dealing, and said he hadn't previously earned money working for Petitioner's drug business, but rather from washing dishes. (Petition, at 6-7, att.) "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Evidence is material, and therefore subject to the Brady rule, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). In order to show a due process violation, a defendant must show "that the favorable evidence could reasonably be takn to put the whole case in such a different light as to undermine confidence in the verdict." Kyles v. Whitley, 514 U.S. 419, 435, 115 S.Ct. 1555, 131 L.Ed.2d 481 (1995)

In 1995, the Orange County Superior Court held

an evidentiary hearing to consider these claims. (See Respondent's Lodgment Nos. 13-16; Petitioner's Lodgment No. 18.) Thereafter, the court rejected each of the claims on its merits. (Respondent's Lodgment No. 6.) These rejections were not objectively unreasonable determinations of facts or law and do not entitle Petitioner to federal habeas relief, as follows.

1. Immunity Agreement

Petitioner contends that Benavides had an immunity agreement either with the state agents who investigated the murder/attempted murder or with federal drug enforcement agents investigating Petitioner for drug offenses. (Petition, at 6, att.) The state has consistently denied the existence of any such agreement.

At the state court evidentiary hearing, Petitioner presented the following evidence that Benavides received immunity from police: (1) Benavides' testimony that some officer (he could not recall whom) promised him immunity, or $10,000 in cash, or some sort of protection, in return for telling police who shot him; (2) the 1990 testimony of a DEA agent (Agent Apodaca) who testified that Benavides did not provide him with any information but that Benavides was "going to provide some information to the Los Angeles office;" and (3) federal and state officials met with Benavides numerous times. (See e.g. Respondent's Lodgment Nos. 14, at 13-14, 40-46, 15(4/24/98), at 7-32; Petitioner's Lodgment Nos. 11 and 16, Exhs. 1-A, A, B, R-Z, 13, Exh. W.) On the other hand, the State presented evidence that: (1) the prosecutor did not remember any agreement, but would have disclosed any agreement existed; (2) two DEA agents (agents Ford

and Apodaca) did not offer Benavides immunity or make any other agreement with him; and (4) Agent Apodaca had no actual knowledge of whether Benavides ever provided information to the DEA in Los Angeles, rather his testimony in 1990 was just that if Benavides did provide information to anyone, it would have been someone in Los Angeles. (See e.g. Respondent's Lodgment Nos. 14, at 85-89, 134-82, 15 (4/17/98), at 53-70, 16 (7/21/98), at 2-8.)

The Superior Court denied this claim as follows:

> The only evidence of immunity presented by petitioner is by the speculative/ hearsay testimony of Agent Apodaca at Bueno's trial and David Benavides's testimony at his hearing.
>
> However, Benavides is unable to state who made promises to him. He remembered no specifics regarding any promises to him.
>
> Numerous law enforcement witnesses on the state and federal level testified at this hearing that no promises of immunity of any sort were made to Benavides and that he was not an informant.
>
> There is evidence that the DEA agents only wanted to discuss narcotic transactions and not conduct a murder investigation with Benavides. There is also evidence that the Anaheim Police Department and the Oxnard Police Department wanted to discuss facts only related to their respective murder investigations and that they were not interested in Benavides's

> narcotic activities. From these conversations it's possible Benavides inferred some sort of promises. However, Habeas Corpus relief cannot be based upon the speculation of counsel or the court.
>
> Therefore, this court finds that the petitioner has not sustained his burden of proof on this issue.

(Respondent's Lodgment No. 6, at 4-5.) Even if there is some evidence suggesting the existence of some ill-defined promise to Benavides, Petitioner has neither demonstrated that the state court's factual determination to the contrary was objectively unreasonable nor presented clear and convincing evidence to rebut the presumptive correctness of the finding. 28 U.S.C. § 2254(d),(e). Petitioner argues here that this same evidence demonstrates the unreasonableness of the stat court's conclusion that no agreement existed.[2] This court disagrees. Petitioner is not entitled to habeas relief on this claim.

2. $18,000 Bank Account

Next, Petitioner contends that Benavides had access to a Mexican bank account containing $18,000

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2. In fact, in the course of the state court evidentiary hearing, Benavides appeared to disavow (or at least distance himself from) his 1994 declaration prepared by Petitioner's counsel (see Petitioner's Lodgment No. Exh. A) wherein he stated he had been offered immunity; later he again appeared to agree with the contents of the declaration and testified that he was promised something by the police. (See Respondent's Lodgment No. 15 (4/17/98), at 47-50; (4/24/98), at 7-32.)

when he was supposedly desperately seeking money from Petitioner. (Petition, at 6, att.) However, Petitioner also contends that his attotney was aware of the existence of this account prior to trial. (See Traverse, at 28; Petitioner's Lodgment No. 13, Exh G.) If the defense was aware of the evidence, no prejudicial prosecutorial misconduct occured and this claim must fail. United States v. Aichele, 941 F.2d 761, 764 (9th Cir. 1991).

However, even if defense counsel did not know about the account, Petitioner cannot demonstrate any error by the state courts in denying this claim. The Orange County Superior Court summarized the evidence presented and denied the claim based on this possibility, as follows:

> The evidence shows that David Benavides, at the time of the shooting on 2-5-81, knew of the existence of an $18,000 two-year Certificate of Deposit in the name of his wife and son in a Mexican bank. The wife had been murdered on 10-31-80. Benavides was a suspect in that murder. The Certificate of Deposit didn't mature until after Benavides was released from the hospital after the shooting in 1982. Benavides also didn't know how much money was in the account at that time or when it would mature. He also was not a signatory on the account. This account was supposed to be for his children.
>
> Additionally, Benavides didn't appear to have the time to extract funds from a Mexican bank account not in

> his name. He paid $5,000 with a "rubber" check to secure his release from La Mesa Prison. He needed "quick" money to cover his "non-sufficient funds" check. The petitioner was his most expedient source because Benavides said that the petitoner owed him $40,000. This was for money loaned by Benavides to [Petitioner] in order to bribe [Petitoner's] way out of a Mexican Prison on an earlier occasion and for prior drug transactions.
>
> Benavides didn't have access to the $18,000 C.D., didn't want to spend his children's money, and wanted [Petitioner] to pay back a portion of what he owed Benavides.
>
> Also, Benavides was a suspect in his wife's murder which had occurred 3 months previously. Taking assets which were in her name may have made him more suspect.

(Respondent's Lodgment No. 6, at 2-3; see also Respondent's Lodgement Nos. 14, at 8-26, 15 (4/17/98), at 35-46.) Therefore, the court reasoned, evidence of the bank account did not undermine Benavides' credibility or undermine the prosecution case against Petitioner.(Respondent's Lodgment No. 6, at 3.)

Here, Petitioner repeats the argument he made in state court and relies on the same evidence. (See Petition, at 6, att.; Petitioner's Lodgment No.13, Exhs.

C, D.) The state court did nor unreasonably determine that the existence of an account about which Benavides had only limited knowledge and which he could not necessarily have accessed (or at least not quickly accessed) not have undermined Benavides' testimony that he contacted Petitoner because he needed to quickly obtain a large sum of money. Petitioner is not entitled to relief on this claim. Kyles, 514 U.S. at 435 (due process violated only where "the favorable [undisclosed] evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.").

3. Benavides' Involvement with Petitioner's Drug Business

Finally, Petitioner contends that the prosecutor committed Brady error in failing to disclose Benavides' statement to the prosecutor before trial that he earned money previously from washing dishes, not from transporting drugs for Petitioner and his family. (Petition, at 7, att.; Traverse, 19-22.) Petitioner became aware that Benavides told prosecutors that he had saved $20,000 from washing dishes only when Detective Hammaker testified in this regard at the 1998 state court evidentiary hearing. (See Traverse, at 19-20; Respondent's Lodgment No. 16 (7/21/98), at 51-52.) Petitioner also faults the prosecution for not disclosing Benavides' other blanket denials of his involvement in Petitioner's drug dealings, although, in his opening statement, defense counsel noted that Benavides has previously denied involvement in the Rios' family drug business. (Petiton, at 7, att.; Traverse, at 22-24; RT 2377-78.)

The Superior Court denied these claims because

it found that Benavides' pre-trial denials of any involvement in Petitioner's drug business, made to federal drug enforcement agents, were not "exculpatory, favorable or material" to the defense. (Respondent's Lodgment No. 6, at 6-7.) The Superior Court found specifically that Benavides was thoroughly impeached on many fronts, including his conflicting statements about the extent of his involvement in drug dealing. (See id.) Moreover, the court found that evidence of Benavides' self-serving denials of involvement in illegal activities was not material to the defense because defense counsel's strategy was to impugn Benavides' credibility with his admitted involvement in illegal drug dealing. (See id.; Respondent's Lodgment No. 17, at 13-24.)

The state court's decision that additional evidence that Benavides previous denials of involvement with Petitioner's drug business or claims having earned money by washing dishes rather than transporting drugs was not material Brady evidence was not objectively unreasonable. Kyles, 514 U.S. at 435. Benavides was impeached with evidence of his involvement in illegal activities and with his own conflicting testimony about his involvement in drug dealing. Moreover, that Benavides earlier denied personal involvement in illegal activities when questioned by federal agents is hardly surprising and likely would have carried little weight with the jury. Petitioner is not entitled to relief on this claim. 28 U.S.C. § 2254(d).

VI.
INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner contends that his attorney was

ineffective. To establish a prima facie claim of ineffective assistance of counsel, Petitioner must demonstrate that trial counsel's performance was deficient and that the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Petitioner bears the burden of establishing both components. Id. Deficient performance is performance which is objectively unreasonable under prevailing professional norms. Id., 466 .S. at 687-88. Under Strickland, counsel's deficient performance prejudices a petitioner where there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id., 466 U.S. at 694.

In reviewing trial counsel's performance, the Court will strongly presume that the counsel's conduct was within the wide range of reasonable assistance, and that he exercised acceptable professional judgment in all significant decisions made. Id., 466 U.S. at 689. Only if counsel's acts or omissions, examined within the context of all the surrounding circumstances, were outside the "wide-range of professionally competent assistance," will Petitioner meet this initial burden. Id., 466 U.S. at 690.

Petitioner claims that his attorney was ineffective in at least six separate instances, as follows.

1. Counsel did not Locate Bueno

Petitioner argues that counsel should have located Bueno, the man Benavides identified as the second shooter, to testify at Petitioner's trial. (Petition, at 7; Traverse, at 33-34; Supplemental Traverse, at 9-13.) It is not clear from the record before this Court

why Bueno had not been located at the time of Petitioner's trial; apparently, the prosecution later attempted to try Bueno. (See e.g. Petitioner's Lodgment No. 13, Exhs. M, W.) Petitioner includes here a declaration from Bueno in which Bueno declares that he was not involved in, and had no knowledge about, the shooting. (Petitioner's Lodgment No. 13, Exh. M.)

Even assuming counsel should have found a suspect the police did not locate, Petitioner cannot demonstrate prejudice from counsel's actions. Petitioner was tried along with Castillo, the other person identified by Benavides as a shooter. Benavides positively identified Castillo but Castillo protested his innocence. The jury acquitted Castillo, yet convicted Petitioner. Since the jury did not alter its view of Petitioner's guilt despite what they determined to be less than proof beyond a reasonable doubt - Benavides' identification of Castillo - Petitioner has not demonstrated the importance of the accuracy and reliability of Benavides' identification of Bueno as the second shooter. Even if there is an argument to be made that the jury may have distrusted Benavides more if he were shown to be unconvincing as to his identifications of both shooters (which of course assumes further that the jury would have believed Bueno's protestation of innocence), the state courts reasonably could have found to the contrary. Thus, under the AEDPA relief is not warranted. 28 U.S.C. § 2254(d); Price, 538 U.S. at 643 (even where reviewing court might find that error occurred, habeas relief is not warranted where state court denial of claim is "at least reasonable").

2. Counsel did not investigate Mexican Bank Account

As noted above, Petitioner argues that his attorney was aware of the existence of this account prior to trial and failed unreasonably to investigate it in order to discredit Benavides. However, also as shown above; even assuming counsel had an obligation to investigate the account, its existence does not significantly discredit Benavides' trial testimony. Therefore, as the Superior Court found, Petitioner cannot demonstrate prejudice. Strickland, 466 U.S. 687; (see Respondent's Lodgment No. 6, at 3 ("[P]etitioner's trial counsel was not ineffective for failing to conduct an additional investigation" because "the evidence of this bank account does not totally undermine Benavides's motive for contacting the petitioner.").)

3. Counsel did not Introduce Statements Benavides Made During a Polygraph Examination

Petitioner alleges that Benavides made (or did not make) numerous statements during a polygraph examination and that defense counsel was ineffective for failing to use them at trial. (Petition, at 7; Traverse, at 34-35; Supplemental Traverse, at 13-19.) Petitioner contends that in the polygraph examination: (1) Benavides said that he asked his wife to send him $1,000, not the $5,000 he claimed he needed from Petitioner; (2) Benavides said he did not want to see anyone in the Rios family at the same time he was seeking money from Petitioner; (3) Benavides said it cost $10,000, not $5,000, to get out of jail; (4) Benavides did not say he was trying to repay anyone; (5) Benavides said Tarango could raise money by selling Benavides' interest in their shared property, and

(6) Benavides identified as a shooter as another individual. (Traverse, at 34-35.)

Petitioner submitted to the state courts a transcript of the polygraph examination wherein Benavides made (or as for contention no. 4, petitioner did not make) these statements. (See Petitioner's Lodgment No. 13, Exh. K.) Although these statements may have contradicted some of Benavides' statements at trial, the state courts reasonably could have determined that Petitioner failed to demonstrate prejudice from any failure by counsel to use them to impeach Benavides. As the Orange County Superior Court and California Court of Appeal found in denying relief on different claims, Benavides' testimony was "replete with impeachment." (See Respondent's Lodgment No. 6, at 6-7; Respondent's Lodgment No. 2, at 12.) This is a fair assessment of the trial transcript. Whatever further impeachment the introduction of these statements could have achieved certainly could be found not to have created a reasonable probability of a more favorable result for petitioner. Strickland, 466 U.S. at 694; Greene v. Henry, 302 F.3d 1067, 1072-73 (9th Cir. 2002); 28 U.S.C. § 2254 (d).

4. Counsel did not Demonstrate that the Truck next to which Petitioner was Photographed was not the "Getaway Car"

Two witnesses testified about the "getaway car" in which the shooters fled. Witness Mossey testified that the vehicle was a four wheel drive truck; witness Boege testified that the vehicle was an American four wheel drive truck or a large pickup raised with large tires. (RT 2068-699, 2119-22.) Petitioner has presented photographs he claims were introduced at trial which

show him standing next to a (possibly light colors) pickup truck which photographs were used by the prosecutor to connect Petitioner to the shootings. (Petitioner's Lodgment No. 13, Exh. O; Traverse, at 35-36; Supplemental Traverse, at 19-21.)

On cross-examination, Mossey stated the police did not record his first statement to then and Beoge stated that he did not remember telling police it was a dark truck or anything else about the truck's color. (RT 2082-83, 2124-25.) In the police report submitted by Petitioner to the state courts, Mossey was reported to have said that the vehicle was a "late model 4 wheel drive type vehicle (Bronco, Blazer type) cream or white in color...[which] may have had some type of pin-striping." (Petitioner's Lodgment No. 13, Exh. P.) In that same report, Boege is reported to have said, "4 wheel drive type vehicle possibly a pickup truck" but that he "did not know the color of the vehicle, but it was possibly dark." (Id.)

According to Petitioner, the truck with which he was photographed was not consistent with the two descriptions given to police, but was consistent with the "getaway car" described at trial. Therefore, he argues, if not for counsel's failure to impeach the witnesses with their prior statements, the prosecutor would not have been able to argue in closing that the truck in the photos was the one used in the shootings. (See e.g. RT 2808, 2902-10, 2914-15.)

Even if counsel had attempted to use the prior statements to impeach the witnesses, doing so would not have created a reasonable probability of a different result. Despite Petitioner's arguments to the contrary, the witnesses; statements at trial did not significantly contravene their statements recorded in the police

report; and even if they did, the statements in the police report are not so clearly divergent that their introduction necessarily would have demonstrated that the truck in the photographs was not that described by the witnesses to the police. Moreover, even if the witnesses in their statements to police did not clearly describe the truck shown in the photographs, Petitioner's connection to the "getaway" vehicle was not critical to the State's case against Petitioner, or at the very least, the state courts reasonably could have found as much. Therefore, the state courts reasonably could have determined that Petitioner was not prejudiced by counsel's actions. Strickland, 466 U.S. at 694; 28 U.S.C. § 2254(d).

5. Counsel did not Limit Introduction of Evidence that Petitioner was Involved in Drug Trade

The California Court of Appeal denied this claim on habeas review as follows:

> [Petitioner] ignores trial counsel's stated tactical purpose in allowing in the evidence without objection. At the evidentiary hearing, trial counsel testified de did not object to evidence of drug trafficking since the evidence also demonstrated Benavides was selling heroin in Mexico. Counsel recognized the trade-off, i.e., [Petitioner] would be labeled a drug dealer, but weighed the attendant risk against the need to impeach Benavides. A tactical decision within the scope of reasonable competence will not be second guessed.

(Respondent's Lodgment No. 2, at 18; see also Respondent's Lodgment No. 17, at 13-24.) Petitioner contends that counsel unreasonably failed to object to the introduction of any evidence of Petitioner's alleged drug dealing as bad character evidence. (Traverse, at 37-38; Supplemental Traverse, at 22-25.)

Having reviewed the record, this Court does not agree with Petitioner that counsel's decision was so unreasonable as to constitute deficient performance. Strickland, 466 U.S. 687. As Petitioner correctly notes, impeaching Benavides was critical to his defense, and counsel reasonably chose to attempt to do so through the drug-trade testimony. The state court's reasoned decision denying this claim is not itself objectively unreasonable, the threshold for Petitioner's entitlement to habeas relief in this Court. 28 U.S.C. § 2254(d).

6. Counsel did not Object to Witness Perez Testifying that he Feared Petitioner

Petitioner contends that his attorney should have objected when Pedro Perez, the intermediary between Petitioner and Benavides, testified that he feared Petitioner. (Petition, at 7; Traverse, at 38-39; Supplemental Traverse, at 25.) Perez testified that he originally denied knowing Petitioner when questioned by police because he was "concerned for [his] family." (RT 2249-54.) In a bench conference, Perez indicated he feared Petitioner only because the police told him Petitioner was dangerous; this information was not relayed to the jury. (Id.) However, in that same conference, defense counsel (and counsel for Petitioner's co-defendant) argued that Perez should not be able to testify in this manner because his fear of Petitioner was based only on what the police told him.

(RT 2251-53.)

Counsel did, in fact, object to Perez's testimony at this bench conference; thus, Petitioner has not demonstrated that counsel performed deficiently. See Dows v. Wood, 211 F.3d 480, 487 (9th Cir. 2000) ("Under Strickland, counsel's representation must be only objectively reasonable, not flawless or to the highest degree of skill."). The state courts reasonably denied this claim. 28 U.S.C. § 2254(d).

VII
ACTUAL INNOCENCE

Finally, Petitioner argues that he is actually innocent of all the charges. (Petition, at 7, att.) It is not clear that a prisoner not sentenced to death even has a right to raise a freestanding claim (that is, without a federal constitutional nexus) of innocence in habeas proceedings. Herrera v. Collins, 506 U.S. 390, 393, 113 S.Ct. 853, 122 L.Ed.2d 20 (1993) (suggesting that right may exist only in capital cases); Turner v. Calderon, 281 F.3d 851, 872-73 (9th Cir. 2002) (same). Even in a capital case, "a habeas petitioner asserting a freestanding innocence claim must go beyond demonstrating doubt about his guilt, and must affirmatively prove that he is probably innocent." Jackson v. Calderon, 211 F.3d 1148, 1165 (9th Cir. 2000) (quotation omitted). This standard "contemplates a stronger showing than insufficiency of the evidence to convict." Id. (quotation omitted).

Assuming Petitioner is entitled to raise this claim, it fails. Petitioner does not approach an affirmative showing of innocence. In support of his claim, Petitioner submits the following: (1) a declaration by Bueno stating that he had no knowledge of, or involvement in,

the shooting and does not know Petitioner; (2) a declaration by Castillo disclaiming any personal involvement in the shooting; and (3) a 2001 letter from Benavides to Petitioner's attorney in which Benavides states he is no longer sure Petitioner called him to arrange the meeting at which the attacks occurred. (See Petition, at 7, att.; Petitioner's Lodgment No. 13, Exh. M, Petitioner's Lodgment No. 15, Exh. 18.)

Even assuming the veracity of the Bueno and Castillo declarations, they do not demonstrate Petitioner's innocence. If these two men were not involved in the shooting, they would have no basis on which to state that Petitioner also was not involved. If they know nothing about the shooting, then they know nothing about the shooting.

As for Benavides' "recantation," even a full recantation is generally to be viewed with caution. See Allen v. Woodford, 366 F.3d 823, 838 (9th Cir. 2004) (noting general distrust of recanted testimony). Here, Petitioner submits a 2001 letter written by Benavides to Petitioner's attorney (translated from Spanish to English) in which Benavides stated that he felt bad "because the day I made my declaration [,] I was very angry, very upset and very confused and the truth is that I was never really sure that [Petitioner] was the person that called me." (Petitioner's Lodgment No. 15, Exh. 22.) Benavides wrote further, "Please Mr. DeMassa try to help [Petitioner], I don't want for him to be facing life in prison because of something I declared and I'm not sure if [Petitioner] was the one that called me." (Id.) In a 1994 declaration Benavides submitted in support of Petitioner's state habeas petition (in which Petitioner was represented by the same attorney to whom Benavides addressed this letter), Benavides made no

such statement. (See Petitioner's Lodgment No. 13, Exhs. C, D.)

Petitioner does not submit compelling evidence of his innocence. Benavides' statements in the unsworn letter are equivocal and suggest a fear about the fact that Benavides is responsible for Petitioner's incarceration, rather than that Petitioner was wrongly convicted. Of course, Benavides' failure to espouse this same concern about Petitioner's innocence in the 1994 declaration is also telling. Petitioner is not entitled to habeas relief based on this purported evidence of innocence. Jackson, 211 F.3d at 1165; see also Turner, 281 F.3d at 873 (holding that to demonstrate innocence, a habeas petitioner must present evidence which conclusively establishes innocence, not which merely casts doubt on guilt).

VIII.
RECOMMENDATION

For all of the foregoing reasons, IT IS RECOMMENDED that the Court issue an Order: (1) approving and adopting this Report and Recommendation and (2) directing that the Petition be denied and the action dismissed with prejudice.

DATED: August 3, 2004

/s/ Jeffrey W. Johnson
JEFFREY W. JOHNSON
United States Magistrate Judge

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

Genaro Gonzalez Rios,	) SACV 01-0319 GLT (JWJ))
Petitioner,	)PETITIONER'S)OBJECTIONS TO
v.	)MAGISTRATE'S REPORT)AND
Ernest Roe Warden,	)RECOMMENDATION;)MEMORANDUM OF)POINTS AND
Respondent,	)AUTHORITIES IN) SUPPORT THEREOF

Petitioner, Genaro Gonzales Rios, by and through his attorney Philip A. DeMassa, of Philip A. DeMassa APC, submits the enclosed Objections to the Magistrate Judge's Report and Recommendation ("Report") and submits the enclosed Memorandum of Points and Authorities in Support Thereof.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF OBJECTIONS TO REPORT AND RECOMMENDATION

I

THE PROSECUTOR COMMITED MISCONDUCT, OR VIOLATED PETITIONER'S RIGHT TO DUE PROCESS BY FAILING TO DISCLOSE IMPEACHMENT EVIDENCE IT WAS PRIVY

TO

The state court decision, and this Court's Report which supports it in all respects, reach a conclusion opposite to that reached by the Supreme Court on questions of law. Further, the state court decided the matter differently than the Supreme Court has, or would have, on a set of materially indistinguishable facts. For the following reasons, Petitioner objects.

The state court's decision, and this Court's Report, is an "unreasonable application" where the state court identified the correct legal principle but unreasonably applied it to Petitioner's case.

The fatal flaw is in the Report's finding that "the court rejected each of the claims on its merits." Report at p. 9, ll. 13-14. It did not. The state court's analysis and its failure to follow federal law cannot be supported under federal Constitutional law. The state court, and now this Court, have incorrectly analyzed each claim separately where it is Constitutionally required to analyze them in totality. As will be seen below, the known evidence supports Petitioner's right to a new trial. As to some, such as the DEA reports (concealed for 17 years) and Det. Hammaker's recollection of Benavides' statements on the eve of trial about making his money dish washing (also concealed for 17 years), there is no question this now known evidence was withheld. As to the discussions with Benavides regarding whether he was told, or believed, he'd received immunity or no promise of prosecution, there is no question Benavides would so testify and his interaction with officers and DEA on these subjects were never revealed to Petitioner at trial.

Federal Constitutional law is clear that all the errors must be viewed together:

> Evidence is deemed prejudicial, or material, only if it undermines confidence in the outcome of the trial. See [United States v.Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375, 3384, 87 L.Ed.2d 481 (1985)(plurality opinion); United States v. Agurs, 4278 U.S. 97, 111-12, 96 S.Ct. 2392, 2401, 49 L.Ed.2d 342 (1976).] For purposes of determining prejudice, the withheld evidence must be analyzed "in the context of the entire record." Agurs, 427 U.S. at 112. Moreover, we analyze all of the suppressed evidence together, using the same type of analysis that we employ to determine prejudice in ineffective assistance of counsel cases. See Bagley, 473 U.S. at 682 (opinion of Blackmun, J.); see also United States v. Shaffer, 789 F.2d 682, 688-88 (9th Cir. 1986)(analyzing collectively the prejudice resulting from the state's suppression of four different pieces of impeachment material.)

Benn v. Lambert, 283 F.3d 1040, 1052-53 (9thCir.2002).

Were these asserted errors analyzed together? No. The state court and now the proposed Report make the same error. Petitioner raised this issue in his

Traverse at pp. 25-26.[1] For this very basic reason, and the for the matters discussed below, the state court's analysis is wrong, its analysis unreasonable, and it unreasonably applied the Brady principle and successor Supreme Court and Ninth Circuit cases to Petitioner's case.

A. Benavides Believed He Was Promised No Prosecution For Speaking About Serious Narcotics Dealing Which Is Critical Impeachment.

The Report notes that "[e]ven if there is some evidence suggesting the existence of some ill-defined promise to Benavides, Petitioner has neither demonstrated that the state court's factual determination to the contrary was objectively unreasonable nor presented clear and convincing evidence to rebut the presumptive correctness of the finding. 28 U.S.C. § 2254(d)(e)." Report at p. 11. Petitioner disagrees with the premise. Supreme Court and Ninth Circuit law require a different view of the known evidence which yields an opposite result from that recommended in the Report.

The Report cites the state court's decision that no "immunity" was offered to Benavides and its finding that "no agreement" existed. Report at p. 11. This conclusion misses the point: Benavides believed he had such an understanding. He so testified at the habeas hearing. Further, he would not have spoken about and

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1. Petitioner urged the same totality of evidence analysis requirement in his ineffective assistance of counsel argument. Supplemental Traverse at pp. 2-3. It similarly was not considered.

then testified at trial about such serious criminal violations without believing he'd received an understanding he would not be prosecuted. Smuggling ten kilos a week of heroin is not a trivial matter. Benavides had just been released from a Mexican prison for cocaine trafficking and knew the penal consequences of such activities.

The state court admitted evidence existed of discussions between DEA and Benavides regarding smuggling narcotics. Report at p. 11. These discussions corroborated Benavides' testimony. However, Petitioner was unaware of them since much of this corroboration was concealed from him until the state habeas hearings when the DEA reports were finally disclosed. What the state court did not find was that such discussions never existed.

Further, the state court did not find that Benavides was lying about his belief that he received such promises. The state court did not reject Benavides' testimony; rather, it accepted it as true. The state court noted it was "possible" Benavides "inferred some sort of promises". However, it did not find make a finding Benavides' belief was unreasonable, unreliable, delusional, manufactured, recently contrived or fatuous. In other words, the court admitted the *existence* of exculpatory impeachment evidence which Petitioner did not have at trial. Whether this evidence is evidence concealed or newly discovered, it was evidence Petitioner was entitled to. Benavides *believed* what he heard. Benavides was the indispensable, requisite prosecution witness in a death penalty trial. His contacts with DEA and his statements made to them, and them to him, were concealed from Petitioner. Due process is violated when the evidence is

suppressed by the state, either willfully or inadvertently. Agurs, 427 U.S. at 110, 96 S.Ct. at 2400; Benn, 283 F.3d at 1053.

The existence of admittedly material impeachment material is even more beneficial to Benavides than cases in an ineffective assistance of counsel context where alibi witnesses were not produced. The witnesses' testimony must be considered on its face and not whether the Court believes it or not. (Here, however, there is no question but that the state court believed Benavides.)

In Lord v. Wood, 184 F.3d 1083 (9th Cir. 1999), trial counsel never interviewed three potential witnesses and did not to call them as it would hurt "their" [trial counsel's] credibility as they didn't believe the witnesses. Id. at 1089, 1092. After the witnesses testified at an evidentiary hearing, the Court noted that "Lord's claim of ineffective assistance turns on counsel's failure to call to the stand three witnesses who, *if believed*, would have cleared Lord of the murder." Id. at 1085.(emphasis supplied).

The Court concluded that "counsel's cursory investigation of the three *possible* alibi witnesses, and their subsequent failure to put them on the stand, constitute deficient performance that was prejudicial to Lord's defense." Id. at 1093.(emphasis supplied). The Court granted the writ, finding "the *possibility* that their testimony would have led to Lord's acquittal to be `sufficient to undermine confidence in the outcome.'", citing Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068 (1984).(emphasis supplied).[2]

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2. Although Lord alleged in his writ 36 separate
(Fn. cont'd.)

The Court recently discussed how alibi testimony would be viewed by the jury, not the Court weighing whether to grant a writ. In Alcala v. Woodford, 334 F.3d 862 (9th Cir. 2003), trial counsel failed to present several alibi witnesses who would have shown the defendant was at Knott's Berry Farm when the murder occurred. Petitioner presented the alibi witness' statements and a tape interview. Id. at 870, 872. The Court noted that if such evidence "had been presented" at trial it would have accounted for Alcala's whereabouts during the critical time period. The presentation "would have given the jury a choice between believing the testimony of apparently disinterested employees of Knott's Berry Farm or that of Young [the eye witness]." Id. at 872-73. There is no requirement that this evidence need to first pass through a credibility filter at the evidentiary hearing. Or, that there also existed contrary evidence. See also, Riley v. Payne, 352 F.3d 1313, 1318, 1325 (9th Cir. 2003).

B. The Prosecutor Concealed D.E.A. Reports And Police Information Which Constituted Material Impeachment Of Benavides.

The Report rejects Petitioner's claim that he was denied due process because a number of impeachment statements were withheld. The Report specifically discusses the dish washing income evidence and "other blanket denials of his [Benavides] involvement in Petitioner's drug dealings." The Report adopts the superior court's finding that evidence of Benavides'

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2. (Continued)
errors, the Court considered this one error sufficient to grant the writ. Id. at 1085.

self-serving denials of involvement in illegal activities was not material to the defense because the defense strategy was to impugn his credibility with his admitted involvement in illegal drug dealing. Report at p. 14.

The Report downplays the significance of Petitioner's argument about Benavides' "other blanket denials" by observing that trial defense counsel "noted that Benavides had previously denied involvement in the Rios' family drug business." Id. The Report makes a number of incorrect assumptions, erroneous factual findings not supported by the record, conclusions and ignores the law regarding the quantum of impeachment evidence required in a single witness case such as this to find Constitutional due process error. The issue is two-fold: (1) Does the trial record support the superior court's finding and thus
the Report?[3] and (2) What evidence was withheld from Petitioner with which to impeach Benavides' claims about drug dealing and his relationship with Petitioner?

1. The record does not support a finding that Benavides was impeached about his "conflicting statements about the extent of his involvement in drug dealing." Report at p. 14. There is no conflicting evidence about Benavides' involvement in drug dealing, although the defense attempted to present such evidence, discussed below, it failed.

The Report found "defense counsel noted that Benavides had previously denied involvement in the Rios' family drug business." Id. Defense counsel said

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3. The beginning point is the trial record. Over the years Petitioner has seen this record casually cited in state court without factual support. Having again reviewed the trial testimony.

this during opening statement after the People rested and after he had waived cross-examination of Benavides. RT 2377-78[4]. Benavides had not denied involvement in the Rios family drug business when he testified as a prosecution witness. Counsel's opening statement thereafter was not evidence. Neither defendant successfully introduced evidence of Benavides' drug dealing. RT 2407-91.

Benavides didn't recall telling Ontario police officer Skeeters he wasn't involved in narcotic trafficking. RT 2417-18. Lack of recall is not evidence. However, this fact could have been established by impeachment evidence from Skeeters. It didn't happen.

Benavides denied telling Det. Skeeters he and Tarango were partners, along with Javier Santana, in an organization importing heroin into the United States or that he sold narcotics through the El Ranchito Bar in Tijuana. Benavides didn't recall making such statements to Skeeters. RT 2514-16. These denials or lack of recollection were not evidence of the existence of the facts contained in the questions. Further, none of these denials related to Petitioner or his family.

If Benavides had made such statements to Skeeters, the defendants' attempt to impeach Benavides through Skeeters was unsuccessful as the court sustained the prosecutor's objection that the question

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Petitioner knows the record does not support the state court's conclusions. Petitioner must not be condemned to die in prison unless the record affirmatively and strongly supports such findings. It does not.

4. The Reporter's Transcripts are Respondent's Lodgment No.

was "improper".[5] The court rejected the defense's offer of proof. RT 2583-86. Even if Skeeters' testimony was admitted, it still had nothing to do with Petitioner; rather it related to Benavides smuggling kilos of heroin and cocaine into Los Angeles from Mexico along with his drug relationships with Tarango and Santana. Id. Skeeters' interview occurred December 15, 1980 at the La Mesa, Mexico prison, shortly after Benavides' wife was murdered. A D.E.A. agent was present. RT 2586-87, 2596. At the same meeting, Ontario Police officer Paramo asked Benavides "if he was involved in narcotics on that date that you were there?" Benavides denied it. RT 2599-2600. This equivocal evidence only established Benavides was not involved in narcotics at the prison; it had nothing to do with Petitioner or drug dealing outside prison. Similarly, Benavides told homicide detective Hammaker he had "nothing to do with Javier Santana." RT 2727. This denial could not establish either Santana was a drug dealer or that Benavides was involved in drugs with him. Contrary to the Report at p. 15, the record does not support a finding that Benavides was impeached with his own conflicting testimony about his involvement in drug dealing. There simply is no evidence to support it.

2. Even if there were denials by Benavides of generalized drug dealing, impeachment evidence regarding Petitioner and his drug dealing was concealed. There was no evidence available or known

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5. The court's sustaining of the prosecutor's "improper" objection is both ludicrous in that there is no such legal objection and symbolic for the numerous other prosecutor's objections which were similarly sustained as reflected in the reporter's transcript pages cited in the text.

to Petitioner that Benavides told the prosecutor on the eve of trial he earned his money washing dishes or that he'd denied involvement in drug dealing with the Rios family during the relevant time period. This is direct, material and exculpatory impeachment. It is not cumulative.

The core issue at trial was not Benavides' general credibility but his credibility regarding his relationship with Petitioner. Therefore, Benavides' assertion regarding that relationship and whatever available evidence existed to impeach it are vitally necessary to comport with due process.

Benavides testified on direct he "worked" with Petitioner from 1974 to the beginning of 1978 in marijuana and cocaine. Petitioner would bring the drugs to Benavides who would deliver them. Petitioner smuggled the drugs into the United States. For a year and a half Benavides wasn't paid except for rent and food. Benavides loaned Petitioner $22,000 to get out of jail. RT 2278-81.

The concealed D.E.A reports directly impeached Benavides' core assertion of a drug conspiracy with Petitioner during the relevant period. The August 18, 1981 report said Benavides "had no direct involvement with [the Gonzales-Rios brothers] and had not had any contact with them for approximately five years." Petitioner's Lodgment 16, Exhibit Z. The five year period directly intersected the time in which Benavides swore in trial he was complicit with Petitioner in a drug conspiracy during the years 1976 to early 1978. Benavides said he did not deal narcotics with the Rios family because the "brothers did not trust him in their business dealing." Benavides said he was unable to provide information prior to 1975, which was six years

before the interview. This is clear, material impeachment.

The August 18, 1981 D.E.A. interview also impeached Benavides' trial testimony that he actively sought out Petitioner when he crossed the border in February, 1981. Benavides believed the family was trying to kill him. (Id.) so he therefore would not be associating with or looking for them. This was material impeachment which went to the core issues in the case.

The D.E.A. report of February 20, 1981 was further direct impeachment of the same core issue. Immediately after the shooting when he ostensibly had the greatest motive to implicate them, Benavides denied any knowledge about Petitioner and his brother's drug business. Petitioner's Lodgment 14, Exhibit 8, p. 2 of attached Exhibit A.

Similarly, Benavides' statement he earned the money dish washing was material impeachment of his trial testimony. The superior court's analysis that it may have been said in jest is totally speculative and without support in the record. The statements to the prosecutor and Hammaker were made on more than one occasion and were not done in a joking manner. The jury was entitled to hear this impeachment evidence.[6]

Concealment of impeachment evidence deprived Petitioner "of the basic right to have the prosecutor's case encounter and `survive the crucible of meaningful

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6. If the prosecutor thought this comment was a "joke", he would have turned it over on the eve of trial. The only information turned over as trial started was about drug dealing. Hammaker recalled the dish washing evidence 17 years later which never made it into a report. No one accused Hammaker of being a liar or manufacturing evidence.

testing.'" Franklin v. Henry, 122 F.3d 1270, 1273 (9th Cir. 1997), citing Crane v. Kentucky, 476 U.S. 683, 690-91, 106 S.Ct. 2142, 2146, 90 L.Ed.2d 636 (1986)[Court committed Constitutional error in denying defendant evidence to impeach his confession which was sole evidence against him.]; DePetris v. Kuykendall, 239 F.3d 1057, 1062 (9th Cir. 2001)["where a defendant's guilt hinges largely on the testimony of a prosecution's witness, the erroneous exclusion of evidence critical to assessing the credibility of that witness violates the Constitution."]; Benn, 283 F.3d at 1055, 1058: "In cases in which the witness is central to the prosecution's case, the defendant's conviction indicates that in all likelihood the impeachment evidence introduced at trial was insufficient to persuade a jury that the witness lacked credibility. Therefore, the suppressed impeachment evidence, assuming it meets the test for disclosure, takes on an even greater importance."

Where there is a witness whose "'reliability ... may well be determinative of guilt or innocence,' nondisclosure of evidence affecting [his] credibility falls within [the Brady] rule." Giglio v. United States, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972); Carriger v. Stewart, 132 F.3d 463, 479 (9th Cir. 1997)["Material evidence required to be disclosed includes evidence bearing on the credibility of government witness."]; Shaffer, supra, 789 F.2d at 689.

Evidence of a lie about Benavides' lack of relationship to Mr. Rios or admitted lack of knowledge of Petitioner's drug dealing are direct evidence necessarily needed to "punch holes" in his credibility. Benn, supra, 283 F.3d at 1057. Equally serious is Benavides' statement that he earned his money washing

dishes. The state cannot call a witness it knows is committing perjury and allows the false statement to go without correction. Id. at 1058-59, fn. 11.

II

PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AMD DUE PROCESS SINCE CRITICAL EVIDENCE AND WITNESSES WERE NOT PRODUCED AND OBJECTIONS NOT MADE, THEREBY DENYING HIM A FAIR TRIAL

The Report rejects each of Petitioner's separate claims of ineffective assistance of counsel by analyzing each. As discussed above in its due process analysis, Petitioner objects that the Report failed to examine the claims together as Constitutionally required. A determination of whether trial counsel was ineffective on one ground cannot be considered alone as it is also interwoven with all other alleged errors so that the Court must view them all cumulatively. Alcala, supra, 334 F.3d at 883, 888-89. Here, the various claims, when cumulatively considered, establish ineffective assistance of counsel. Petitioner raised this issue in his Supplemental Traverse to Answer at pp. 2-3.

The Report is objected to on several of the claims mentioned below because it applied an incorrect legal standard to Petitioner's claims which were never discussed by the state court in its habeas opinion.

A. Trial Counsel Failed To Investigate And Call The Alleged Gunman Bueno.

The Report rejects Petitioner's argument trial counsel was ineffective for failing to locate or call Bueno, the alleged second shooter who injured Benavides. Although the Report noted that Benavides would have been "distrusted more if he were shown to be unconvincing as to his identifications of both shooters", it nevertheless made a negative finding against Petitioner since "the state courts reasonably could have found to the contrary." The Report found no relief where a state court denial of a claim is "at least reasonable." Report at pp. 16-17. The problem with the Report is that as to this claim, and all others below (with the exception of the $18,000 claim), the state court failed to recognize the issue and made no findings!

The Report can't give due deference to something the state court never addressed. The federal court is "not required to defer to a state court's decision when that court gives us nothing to defer to." Fisher v. Roe, 263 F.3d 906, 914 (9th Cir. 2001); Pirtle v. Morgan, 313 F.3d 1160, 1167 (9th Cir. 2002)["there is no state court decision on this issue to which to accord deference."]

Petitioner has consistently raised the Bueno issue throughout his petitions, including setting out in the instant Petition his exhaustive attempts to have the matter considered. Traverse to Answer at pp. 33-34.

An attorney "must... provide factual support for [the] defense where such corroboration is available." Failure to pursue such corroborating evidence with an adequate pretrial investigation may establish constitutionally deficient performance. Pretrial investigation and preparation are the keys to effective representation. United States v. Tucker, 716 F.2d 576,

581-84, fn. 17, 594 (9th Cir. 1983).

The "proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Strickland, supra, 466 U.S. at 688, 104 S.Ct. at 2065; Sims v. Livesay, 970 F.2d 1575, 1580-81 (6th Cir. 1992) (failure to further investigate physical evidence coupled with no explanation for that failure was negligence and not excused as a trial tactic); Hoots v. Allsbrook, 785 F.2d 1214, 1220 (4th Cir. 1986)(neglect even to interview available eyewitnesses to a crime cannot simply be ascribed to trial strategy and tactics).

Although there may be a strong presumption that counsel's conduct fell within the range of professional assistance when an investigation was conducted, there is no such presumption when no investigation was conducted. Strickland, supra, 466 U.S. at 690-91, 104 S.Ct. at 2066; Sims, supra, 970 F.2d at 1580.

The record is clear that Bueno was available, living 25 miles from the court. His testimony would have devastatingly impeached Benavides. Failure to investigate and call Bueno was deficient performance.

B. Trial Counsel Failed To Investigate Or Question Benavides About The Existence Of Funds Available To Him.

The Report rejects Petitioner's arguments regarding trial counsel's failure to investigate the $18,000 Mexican bank account and question him about it.

The state court found Benavides knew on February 5, 1981 of the existence of the $18,000 two-year CD but later found he didn't know how much money was there or when it would mature. Report at p.

12. The state court contradicted itself. Benavides knew there was at least $18,000 and he went down to Tijuana with the remaining signator, David Jr., that summer to close out the account.

The state court incorrectly found the CD did not mature until he was released from the hospital in 1982. Benavides was released from the hospital three days after the shooting in February, 1981 and taken to the Anaheim Police station. RT 2540-41. The court ignored the evidence that it was easy to borrow money against a CD.

The state court incorrectly found that Benavides paid $5,000 with a "rubber check." Tarango gave a check to the attorney; Benavides did not. Benavides was in prison. RT 1938. Thus, this was not Benavides' insufficient funds check. Tarango had an interest to cover his check. RT 2277, Petitioner's Lodgment 15, Exhibit 19, pp. 3-7.

The state court incorrectly found that Benavides would have made himself more of a suspect in his wife's murder by taking assets in her name. The record does not support this theory. The previously hidden D.E.A. report showed Benavides put his wife's Oxnard house on the market in March, 1981. Petitioner's Lodgment 15, Exhibit 17, p. 10. This was a month after he was shot and was the suspect in his wife's murder. At trial Benavides said he sold the house in July, 1981. RT 2431. Benavides obviously was not worried about selling his wife's assets even when he was the only murder suspect. The record does not support the state court decision.

The Report found that this evidence did not "significantly discredit Benavides' trial testimony." Report at p. 17. This is an unreasonable finding not

supported by the theory of the case. Benavides' entire motive was seeking out Petitioner because he claimed he was broke. The account clearly would impeach him that he had funds. Without this motive, there was no reason to look for Petitioner.

C. Trial Counsel Failed To Present Impeachment Statements Of Benavides Made During A Polygraph Examination.

The Report rejects Petitioner's claims that trial counsel failed to introduce Benavides' impeachment statements made during the polygraph examination, finding that they would not have created a reasonable probability of a more favorable result. Report at pp. 17-18. This finding was, like the Bueno claim, never discussed by the state court, despite Petitioner's insistence that it be considered throughout his writs. Therefore, there is no deference owed to a non-finding by the state court and 28 U.S.C. § 2254(d) does not apply. Trial counsel admitted he did not know how to introduce the statements.

Clearly established federal Constitutional law mandates that the failure to use these obviously impeachment statements denied Petitioner due process and trial counsel was deficient. Petitioner has previously cited the necessity in single witness cases for the use of all available impeachment. See, supra, at pp. 12-13, which is incorporated into this argument. The Report failed to consider the effect of these admittedly impeachment-worthy statements along with the entirety of the other errors as they must be viewed cumulatively. Alcala, supra.

D. Trial Counsel Failed To Offer Evidence The Alleged "Getaway" Car Was Not In Any

Way Similar To The Car Petitioner Was Photographed Standing Next To.

The Report found that trial counsel's failure to use police reports to refresh Mossey and Boege's recollections the facts of the getaway vehicle was not deficient performance. The getaway vehicle was not critical to the State's case, "or at the very least, the state courts could have found as much" and the "state courts reasonably could have determined that Petitioner was not prejudiced by counsel's actions." Report at pp. 19-20. This is error. The state court decision, like the Bueno claim, totally ignored this argument. The state court decided nothing. Petitioner pointed out his long-standing raising of this issue which the state court ignored. Traverse to Answer at pp. 33-34. Title 28 U.S.C. § 2254(d) does not apply here.

At some point the cumulative weight of the admitted errors, which the Report admits occurred, cannot simply be discounted as not making a difference in the outcome of this case. The prosecution called Mossey and Boege because they added evidence to the case against Petitioner. It introduced photos of Petitioner standing next to a "similar" truck and argued their relevancy to the jury. The prosecutor argued by juxtaposition. How is such evidence, misleading as it was, not prejudicial to Petitioner's case? Counsel's performance was deficient. He had the evidence and failed to use it.

E. Trial Counsel Failed To Seek To Limit Testimony About Petitioner's Drug Dealing.

The Report found trial counsel's performance was not deficient by failing to object to introduction of drug evidence. The Report adopts the state court of

appeal finding. Report at p. 20. There is clear and convincing evidence that counsel's performance was deficient, especially since he admitted it.

There was no "trade-off" for allowing Benavides to state Petitioner was in a Mexican jail and he had to loan Petitioner money to get out. RT 2278-80. There was no foundation as Benavides didn't know which jail Petitioner was in, he'd never visited him in jail and only gave money to Petitioner's wife. RT 2281-82. This is bad character evidence, pure and simple. This issue was never decided by the state court and no deference is owed to it for that reason.

Trial counsel never objected or moved to strike this prejudicial testimony. The appellate opinion was wrong in determining such evidence which didn't also implicate Benavides was some sort of trial tactic. Further, if there were a trial tactic of attempting to impeach Benavides it failed when the court ruled counsel had waived cross-examination and precluded further evidence in Petitioner's presentation.

Nor did counsel ask for any limiting instruction. Counsel admitted his deficient performance: "It went right over my head..." He "forgot" the provision for seeking a limiting instruction. Respondent's Lodgment 17, pp. 24-25. This is not trial tactic.

F. Trial Counsel Failed To Object To A Witness Saying He "Feared" Petitioner Since His Belief Was Based Solely On What An Officer Told The Witness.

The Report found that trial counsel objected at the bench conference and thus was not deficient regarding Pedro Perez saying he denied knowing Petitioner because he was concerned for his family. The

Report notes that trial counsel objected to the testimony at a bench conference. Report at p. 21. The Report does not accurately reflect the facts and it ignores part of Petitioner's argument.

At the bench, the prosecutor promised that he would only ask Perez if he denied knowing Petitioner "because he was afraid. That he can simply answer yes or no. I won't pursue it any further." He asked Perez if he understood and Perez said, "Yes." The court then asked if "the question will be yes or not." Perez said, "Uh huh." Before the jury, the prosecutor totally changed the question to "Mr. Perez, did you deny knowing Mr. Rios because you were concerned for your family?" Mr. Perez said, "Yes, my family." Petitioner's counsel neither objected nor sought to clarify that Perez was afraid because police told him to be afraid. The failure to follow up constituted deficient performance.

Petitioner was on trial for his life and the witness, contrary to what he said a minute earlier in chambers, claimed he feared for his family from an alleged murderer. The Report missed the point when it found Petitioner objected in chambers. The error occurred thereafter. The Report further missed Petitioner's argument that it was deficient performance not to either object, seek a limiting instruction, or try to bring out on re-cross-examination the reason for his concern was what a police officer told him.

As with the Bueno and other claims in this argument, with the exception of the $18,000 claim, the Report erred in finding the state court reasonably denied this claim. The state court never addressed this claim. Thus, there was no reasonable denial and 28 U.S.C. § 2254 does not apply. There can be no

presumption of correctness. This issue, when viewed cumulatively with the other deficiency issues, establishes beyond doubt that Petitioner was denied the effective assistance of counsel.

III
PETITIONER IS ACTUALLY INNOCENT

The Report found that since Petitioner did not present "compelling evidence" of his innocence, this claim must be denied. Report at pp. 22-23. The Report improperly uses an incorrect legal standard and does not cite the evidence which makes it, using the correct legal standard, "more likely than not" that, considering the new evidence and the Constitutional errors, no reasonable juror would have convicted him. Considering all the Constitutional errors and the new declarations and letter from the victim, the Court must conclude no reasonable juror would convict Petitioner.

Habeas corpus is an equitable remedy which precludes application of strict rules. Schlup v. Delo, 513 U.S. 298, 319-20, 115 S.Ct. 851 (1995). The Report observes that actual innocence may only be accorded to those facing the death penalty. Schlup cannot be read so narrowly. Even if it were to be so viewed, Petitioner would qualify as he has been sentenced to life without parole. His death in prison is a certainty. The rules in Schlup apply to Petitioner.

The Report attempts to individually parse the declarations and Benavides' letter to find they "do not demonstrate Petitioner's innocence." Report at p. 22. The Report does not apply the standard required in Schlup. The requisite standard is that Petitioner must "show that it is more likely than not that no reasonable jury would have found petitioner guilty beyond a

reasonable doubt." Schlup, supra, 513 U.S. at 327, 115 S.Ct. at 867.

Schlup further discusses what the Court must consider which is more than the Report considered:

> the district court is not bound by the rules of admissibility that would govern at trial. Instead, the emphasis on "actual innocence" allows the reviewing tribunal also to consider the probative force of relevant evidence that was either excluded or unavailable at trial. Indeed, with respect to this aspect of the Carrier standard, we believe Judge Friendly's description of the inquiry is appropriate: The habeas court must make its determination concerning the petitioner's innocence "in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial."

Schlup, supra, 513 U.S. at 327-28, 115 S.Ct. at 867.

For these reasons, the Report is in error in its determination that the evidence be "compelling" and for its only looking at the declarations and letter. The due process and fair trial Constitutional errors cited in the previous two arguments are also part of the analysis

which leads to Petitioner receiving a new trial.[7] The Report failed to include these errors in its analysis. If the declarations and letter can be so negatively dissected, Petitioner moves for an evidentiary hearing so that there is no doubt. Schlup requires such a result. The further evidence of the eye witness victim and the two alleged participants establishes that Petitioner is factually innocent. The evidence against Petitioner who was not even present is thinner than it was against Castillo whom Benavides identified as an assailant and whom the jury acquitted.

Petitioner has shown that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." Further, it is "more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt" in light of the new evidence. Id. The emphasis on "actual innocence" allows consideration also of "the probative force of relevant evidence that was either excluded or unavailable at trial." Id.

For the reasons set forth above, Petitioner prays that a Writ of Habeas Corpus issue releasing him from the constraints he presently suffers from the State of California's Department of Corrections, or that an evidentiary hearing be held.

Dated: August 18, 2004

/s/ Philip A. DeMassa

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7. Petitioner raised this issue in his Traverse at pp. 39-40.

PHILIP A. DeMASSA
Attorney for Petitioner
GENARO GONZALEZ RIOS

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GENARO GONZALEZ RIOS,	)
	) CASE NO.
	) SACV 01-0319 GLT
Petitioner,	) (JWJ)
	)
v.	) PETITION FOR A
DEPARTMENT OF CORRECTIONS	) WRIT OF HABEAS
DIRECTOR OF	) CORPUS BY A
THE STATE OF	) PERSON IN STATE
CALIFORNIA,	) CUSTODY
WARDEN OF THE	) (28 U.S.C.§ 2254)
CALIFORNIA	)
STATE PRISON AT	) PLACE/COUNTY OF
LANCASTER	) CONVICTION
	) ORANGE COUNTY
	)
Respondent.	)
	)

PLEASE COMPLETE THE FOLLOWING: (Check appropriate number)

This petition concerns:

1.- __x__ A conviction.

1. Venue

a. Place of Detention California State Prison at Lancaster, California

b. Place of Conviction Orange County Superior Court at Santa Ana, California

c. Place Sentenced Orange County Superior Court at Santa Ana,California

2. Conviction on which the petition is based (a separate petition must be filed for each conviction being attacked).

a. Nature of offense involved (include all counts)
Count 1: Murder by Lying in Wait
Count 2: Attempted Murder; Principal used a firearm (both Counts)

b. Penal or other code section or sections Count 1: Penal Code section 187, 190.2(a) (15) Count 2: Penal Code Sections 664 and 187; Penal Code Section 12022(a) (both Counts)

c. Case number C-48121

d. Date of conviction September 1, 1982

e. Date of sentence November 18, 1982

f. Length of sentence on each count Life Without Parole

g. Plea (check one)
(1) Not guilty (X)

h. Kind of trial (check one)
(1) Jury (X)

j. Did you testify at trial?
No (XX)

3. Did you appeal from the conviction of sentence?
Yes (XX)

4. If you did appeal, give the following information for each appeal

a. (1) Name of Court District Court of Appeal, Santa Ana, Division Three

(2) Result Convictions affirmed.

(3) Date of result March 30, 1984

(4) Citation or number of opinion G000610, G000938

(5) Grounds raised (list each)

(a) Denial of mistrial motion due to variance of prosecution evidence from opening statement

(b) Prejudicial admission of hearsay statements that Rios sent 2 persons who shot victims

(c) Insufficient evidence to support murder conviction

(d) Convictions should be collaterally estopped since co-defendant shooter was acquitted

(e) Record not sufficient to support "lying in wait" special circumstance allegation

(f) Ineffective assistance of counsel since he waived cross-examination of the sole witness against Rios, and failure to object to evidence of same witness' drug dealing with Rios which was prejudicial

b. (1) Name of Court California Supreme Court

(2) Result Petition for Hearing denied

(3) Date of result 1984
(4) Citation or number of opinion Petitioner did not maintain this record
(5) Grounds raised (list each)
(a) Petitioner believes the same issues referred to above were raised in this Petition for Hearing

5. If you did not appeal:
b. Did you seek permission to file a late appeal? No(X)

6. Other than a direct appeal, have you previously filed any petitions, applications or motions with respect to this conviction in any court, state or federal? Yes (X)

7. If your answer to 6 was YES give the following information.
a. (1) Name of Court Orange County Superior Court in Santa Ana, California
(2) Nature of proceeding Writ of Habeas Corpus No. M-5486 filed January 26, 1986
(3) Grounds raised Improper jury instructions on aiding and abetting
(4) Result Denied April 11, 1986 and appealed to Court of Appeals in G0005157 Feb. 10, 1987
(5) Date of result Writ denied May 7, 1987
(6) Citation or number of any written opinions or orders entered pursuant to each such disposition G0005157

b. (1) Name of court California Supreme Court
(2) Nature of proceeding Writ of Habeas Corpus filed by Rios in propria persona
(3) Grounds raised Failure to provide separate interpreters for Rios and co-defendant Juan Castillo (who was acquitted); improper aiding and abetting jury instructions, similar issues as raised in direct appeal.
(4) Result Writ denied
(5) Date of result March 16, 1989
(6) Citation or number of any written opinions or orders entered pursuant to each such disposition. S008301

c. (1) Name of court Orange County Superior Court, Court of Appeal, Supreme Court of California
(2) Nature of proceeding Writ of Habeas Corpus
(3) Grounds raised Since prior Writs , Rios discovered new facts 1) he was denied due process & a fair trial as sole witness Benavides received promises of no prosecution for drug dealing and impeachment in DEA reports and statements to the prosecutor, a Mexican bank account and witnesses were concealed; 2) ineffective assistance of counsel; factual innocence
(4) Result Writ denied after hearing in Superior Court; denied in Court of Appeal & Supreme Court without

hearing or opinion

(5) Date of result Superior Court-Sept. 3, 1998; Appeal: March 2, 2000; March 13, 2000

(6) Citation or number of any written opinions or orders entered pursuant to each such disposition. Superior Court-C048121; Court of Appeal-G026467

8. Was an evidentiary hearing held? Yes (XX)

If so, state the name of the court, and the result. Orange County Superior Court denied Writ with written decision that evidence of the Mexican bank account did "not totally undermine" the witness motive"to find Rios & did not undermine the "entire case" or point unerringly to innocence. Although Benavides said he received promises of non prosecution, habeas relief could not be based on speculation of the court. DEA reports newly revealed were more impeachment of an already much impeached witness Benavides and not material to innocence or guilt; newly revealed Benavides statements to the prosecutor just before trial not exculpatory in that it could have been made "in jest". Counsel not ineffective for failing to investigate since evidence would not affect the result or undermine prosecution's "entire case".

9. If your answer to 6 was NO, explain briefly why you did not seek post-conviction relief in the state courts.

10. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly, the facts supporting each ground.

Supporting FACTS (tell your story BRIEFLY without citing cases or law)

a. Ground one Due process was denied when the People concealed facts that its sole witness had promises of immunity when implicating himself and Petitioner in large drug dealing. Benavides paid a $5,000 bribe to get out of a Mexican jail and testified he sought his brother-in-law Petitioner to cover the "bad check." Benavides said he needed money from Petitioner as he had none and Petitioner owed him $20,000 for moving cocaine and marijuana into the United States. The drug dealing evidence surfaced just before trial, had never come up at the preliminary hearing or in police reports. It included Benavides telling the prosecutor during pre-trial talks of his "extensive drug relationship with Mr. Rios" as he moved "as many as 10 kilos [of heroin] every week" across the border. [RT 1918-1919] Neither Benavides nor the People told Petitioner in his trial of any immunity, promises, or leniency for the drug testimony until a DEA agent revealed in another prosecution May 25, 1990 that Benavides may have been an informant. After finally locating him in mid 1994, Benavides swore he received promises of non prosecution for drug testimony immediately after he was shot and before he testified at Petitioner's trial. Benavides later confirmed this at an evidentiary hearing in 1998. He told 2 DEA agents, immediately after he was shot, and the prosecutor before he testified at trial, about Petitioner's drug dealing. Benavides said he was offered by police $10,000, protection, and no "fear of prosecution" or jail for his testimony. DEA agents spoke with Benavides on more than three occasions to have him identify suspects

and talk about Petitioner.

b. Ground two Due process, a fair trial and effective assistance were denied when evidence Benavides had access to an $18,000 Mexican bank account was kept from Petitioner and was in contradiction to Benavides' claim he was broke and needed money from Petitioner. Benavides claimed at trial he "desperately" needed money from Petitioner to cover the "bad check". He was broke. He said he spoke with Petitioner who was to send 2 men to give Benavides $3,000 in Orange County. When he asked Humberto Perez to drive him to meet the 2, the men approached each side of the car, one shot and killed the driver Perez and the other shot and wounded Benavides. Petitioner was not present. Evidence existed but which was unknown to Petitioner that Benavides was a successor in interest to an $18,000 Mexican bank account. Before Benavides was incarcerated in the Mexican jail, he set up a bank account in his wife's and son David Jr's names for more than $18,000. Benavides' wife was killed in Oxnard October 31, 1980 while he was in custody in Mexico. When Benavides was released from jail in early February, 1981, two days before he was shot, he testified at trial he was broke. However, after Benavides admitted to being a successor in interest to the foreign account in 1994, a Mexican bank manager for that bank said in 1998 that Benavides could easily have gone to Mexico with his son David Jr. and closed the account or borrowed money against it, thereby eliminating any need or motive for seeking Petitioner.

c. Ground three Due process and a fair trial were denied when impeachment reports and statements made

to the prosecutor and case agent on the eve of trial were concealed from Petitioner until 1998. Benavides was the sole witness of substance against Petitioner. Before trial, the prosecutor said his interviews with Benavides revealed multi-kilo drug dealing with Petitioner as the reason for their business relationship. Unbeknownst to Petitioner, the prosecution possessed information which flatly impeached such testimony and representations to the court. An August 18, 1981 DEA Task Force report said Benavides "had no direct involvement with (the Rios family) and had not had any contact with them for approximately five years." Benavides said that Rios did " not trust him enough to involve him in their business dealings." Benavides was unable to provide any useful information except for matters occurring before 1975. A February 1981 DEA report, also concealed until 1998, said Benavides "denied any knowledge about" Petitioner's drug business. During the 1998 hearing, investigator Hammaker said when the prosecutor asked Benavides where the $20,000 came from, he was told Benavides "saved it washing dishes." Benavides repeated this statement to Hammaker later. Hammaker never wrote down these statements but recalled them from memory 16 years later. No report was made of these inconsistent statements which clearly contradicted his trial testimony and no attempt was made to notify Petitioner of them. In another statement taken in April, 1997, Benavides told law enforcement he obtained the money working in construction, making wrought iron doors, windows, and cement work.

11. If any of the grounds listed in 10 were not previously presented to this court or any other court, state briefly which grounds were not presented and give

your reasons.

Petitioner is actually innocent. Although raised in state court, actual innocence was not addressed on the merits. Petitioner stood ready to call the two co-defendants, Juan Castillo and Manuel Bueno who would exculpate him. Just as importantly, Benavides wrote a letter to counsel in February, 2001 admitting he was mistaken when he claimed the person who called him the night he was shot (Feb. 5, 1981) was Petitioner. Benavides wrote, in part, "the day I made my declaration [against Mr. Rios] I was very angry, very upset and very confused and the truth is that I was never really sure that he was the person that called me...I was very depressed and there was other people like the District Attorney give me constant pressure along with other people to blame him for the crime...I don't want for him to be facing life in prison because of something I declared and am not even sure Mr. Rios is the one that called me."

12. Do you have any petition, appeal or parole matter pending in any court, either state or federal as to the judgment of conviction under attack?
No (X)

13. Are you presently represented by counsel? If so, name address and telephone number
Yes (XX) Philip A. DeMassa, Law Office of Philip A. DeMassa, APC 2356 Moore Street, Suite 201, San Diego, CA 92110; Telephone: (619) 294-2120
Mr. DeMassa has represented Petitioner since December, 1991 after the information surfaced that Benavides was an informant.
Wherefore, petitioner prays that the court grant

petitioner relief to which he may be entitled in this proceeding.

/s/ Philip A. DeMassa
Signature of Attorney (if any)
PHILIP A. DeMASSA, Esq.
No. 47667

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. I make this verification on behalf of Petitioner as he is not in the County in which I reside and as I am his attorney who is familiar with the facts set forth in this Petition as I have developed them since 1991.

Executed on: March 11, 2001

Philip A. DeMassa
Signature of Petitioner
Attorney PHILIP A. DeMASSA

cc: District Attorney's Office.
Office of the Attorney General, California Department of Corrections C/O Attorney General

S105986
IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re GENARO GONZALEZ RIOS on Habeas Corpus

Petition for writ of habeas corpus is DENIED.

FILED: January 29, 2003

Frederick K. Ohlrich Clerk
DEPUTY

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE

Genaro Gonzalez Rios, Petitioner,	) Case No.: M-7483) S.C. Case No.:) C-48121
On Habeas Corpus.	) Court of Appeal No.:) G020551) **STATEMENT OF DECISION**

Evidence was taken regarding the petitioner's allegations that he had newly discovered evidence. This newly discovered evidence consisted of an allegation that David Benavides has access to $ 18,000 in a Mexican bank account at the time he was released from the La Mesa Prison in Mexico, and an allegation that David Benavides received promises of immunity regarding criminal prosecution from law enforcement officials. Further, that the petitioner was never told of these promises.

During the hearing in this court, additional testimony was allowed regarding an allegation by the petitioner that the respondent failed to provide, prior to the jury trial, a Drug Enforcement Administration report dated August 24, 1981 in violation of *Brady v. Maryland* (1963) 373 U.S. 83 [10 L.Ed.2d 215, 83 S.Ct. 1194].

Also, petitioner claims that the testimony of Anaheim Police Department Detective Hammaker at this hearing indicates that Benavides told law enforcement before trial that money he loaned Rios to secure Rios's release from a Mexican prison was earned from dishwashing. Petitioner alleges this to be also *Brady* error.

I. THE $18,000 IN A MEXICAN BANK ACCOUNT

A. The Issue of Delay:

The shooting in this case occurred in 1981 and the petitioner was convicted in 1982. A Habeas Corpus petition and appeal were denied in 1984. Additional writs were pursued in 1986 and 1988. Petitioner did not hire his present counsel until December, 1991. Counsel's investigator learned of the bank account in April, 1992.

The existence of a Mexican bank account was disclosed to Orange County District Attorney Investigator Wayne Harber on February 3, 1982. Abel Tarango disclosed this information to him in a taped interview. Assuming the subsequent delay was justified in order to obtain admissible evidence in confirming the account, the petitioner is unable to explain the initial 9 year delay. Petitioner fails to show why the account could not have been discovered before 1992. Petitioner did previously possess a copy of the Tarango interview transcript.

It would appear to this court that the petitioner has failed to meet the procedural prerequisites for a delayed writ within the meaning of *In Re Clark* (1993) 5 Cal.4th 750 and *In Re Robbins* (1998) 98 Daily Journal D.A.R. 8368.

However, rather than summarily denying this writ, this court observes that our Court of Appeal required this court to take evidence even though it did not indicate what issues it found to be potentially meritorious. For that reason, this court will address the merits of the petitioner's claim.

B. The Merits of The Petitioner's Claim:

The evidence shows that David Benavides, at

the time of the shooting on 2-5-81, knew of the existence of an $18,000 two-year Certificate of Deposit in the name of his wife and a son in a Mexican bank. The wife had been murdered on 10-31-80. Benavides was a suspect in that murder. The Certificate of Deposit didn't mature until after Benavides was released from the hospital after the shooting in 1982. Benavides also didn't know how much money was in the account at that time or when it would mature. He also was not a signatory on the account. This account was supposed to be for his children.

Additionally, Benavides didn't appear to have the time to extract funds from a Mexican bank account not in his name. He paid $5,000 with a "rubber" check to secure his release from La Mesa Prison. He needed 'quick' money to cover his 'non-sufficient funds' check. The petitioner was his most expedient source because Benavides said that the petitioner owed him $40,000. This was for money loaned by Benavides to Rios in order to bribe Rios's way out of a Mexican prison on an earlier occasion and for prior drug transactions.

Benavides didn't have access to the $18,000 C.D., didn't want to spend his children's money, and wanted Rios to pay back a portion of what he owed Benavides.

Also, Benavides was a suspect in his wife's murder which had occurred 3 months previously. Taking assets which were in her name may have made him more suspect.

Because of the numerous possible explanations, the evidence of this bank account does not totally undermine Benavides's motive for contacting the petitioner.

This evidence does not undermine the respondent's entire case and does not point unerringly to innocence. For the same reason, the petitioner's trial counsel was not ineffective for failing to conduct an additional investigation since there is no reasonable probability that the evidence would have effected the result.

II. PROMISES OF IMMUNITY

A. Delay:

Trial Counsel had numerous D.E.A. and local police reports describing interviews between these agencies and Benavides. Counsel knew that Benavides had been a narcotics trafficker. Benavides testified at the petitioner's trial that he was Rios's drug courier. The issue of possible immunity promises were obvious and should have been raised in the first Habeas Corpus writ in 1984.

However, evidence that Benavides might be an informant for the Drug Enforcement Administration was first discovered on May 25, 1990 during direct examination of D.E.A. Agent Edmundo Apodaca in the trial of the *People of the State of California* v. *Jose Manuel Bueno*. Apodaca testified that he thought Benavides may have been an informant for fellow D.E.A. Agent Kim Ford. The petitioner was unable to locate Benavides until 1994.

Although there are some questions regarding the consistency of the petitioner's four year search for Benavides which was conducted in order to determine if he was in fact a D.E.A. informant and/or received promises of immunity, this court will rule on the merits of the evidence for the same reasons as noted regarding the delay as to the $18,000 Mexican bank account.

B. Merits:

The only evidence of immunity presented by the petitioner is by the speculative/hearsay testimony of Agent Apodaca at Bueno's trial and David Benavides's testimony at this hearing.

However, Benavides is unable to state who made promises to him.

Numerous law enforcement witnesses on the state and federal level testified at this hearing that no promises of immunity of any sort were made to Benavides and that he was not an informant.

There is evidence that the D.E.A. agents only wanted to discuss narcotic transactions and not conduct a murder investigation with Benavides. There is also evidence that the Anaheim Police Department and the Oxnard Police Department wanted to discuss facts only related to their respective murder investigations and that they were not interested in Benavides's narcotics activities. From these conversations it's possible Benavides inferred some sort of promises. However, Habeas Corpus relied cannot be based upon the speculation of counsel or the court.

Therefore, this court finds that the petitioner has not sustained his burden of proof on this issue.

III. DISCOVERY OF AGENT FORD'S AUGUST 24, 1981 REPORT

During the hearing on this Habeas Corpus writ, D.E.A. Agent Kim Ford used a report written by him on August 24, 1981 to refresh his recollection. Paragraph No. 3 of that report states that during Ford's interview with Benavides, Benavides "claimed that the brothers did not trust him enough to involve him in their business dealings, but knew they were dealing

heroin and knew many of their friends including Jose Iriarte Torres. He denied any narcotic activity on his part."

The petitioner claims that he did not possess this report prior to his jury trial, that its contents contain exculpatory impeachment evidence favorable to him, and therefore is a constitutional due process violation of the *Brady* v. *Maryland* line of cases.

It appears from the evidence taken at the instant hearing that the D.E.A. was assisting Anaheim P.D. in the 2-5-98 murder and attempted murder investigation. The evidence also shows that the D.E.A.'s primary objective was to obtain information from Benavides regarding the petitioner's narcotic organization. Agent Ford's 8-18-81 interview of Benavides (Petitioner's Exhibit Z) seems focused primarily on the D.E.A.'s narcotic investigation of Rios. However, Exhibit Z also shows an evidentiary 'overlap' with Anaheim P.D.'s murder investigation in that Benavides tells Ford that Rios and his brother were trying to kill him. Because the D.E.A. had previously furnished information to Anaheim P.D. and Agent Ford first interviewed Benavides on 2-20-81, 15 days after the murder of Humberto Perez and attempted murder of Benavides, it appears that the D.E.A. did assist Anaheim P.D. in the homicide investigation. These D.E.A. interviews were noted in several Anaheim P.D. reports and could have been the subject of discovery requests by defense counsel. (This is not an ineffective assistance of counsel issue because these interviews were known before and after trial and is no longer a timely issue because of the delay.)

The District Attorney had neither possession nor knowledge of this report (Exhibit Z) at any time prior

to this hearing.

Ford's report does not appear to be exculpatory, favorable, or material to the petitioner.

This court notes, as did the Court of Appeal, that Benavides's trial testimony was replete with impeachment. This included his admissions of being a drug courier for Rios and his denials of any other drug dealing. Yet, he was serving time in La Mesa Prison for narcotic possession and officer Paramo of Oxnard Police Department testified at Rios's trial that he interviewed Benavide at the La Mesa Prison and he denied any narcotic activities (R.T. pp. 2596-2599.) Officer Paramo was called by petitioner's trial attorney during his case-in-chief, apparently for the sole reason of introducing this prior inconsistent statement for impeachment purposes. There was no other probative value for officer Paramo's testimony. Also, petitioner's co-defendant's attorney, Mr. Abzug, cross-examined benavides during the People's case-in-chief wherein Benavides denied that he told Oxnard police that he, Abel Tarango and Xavier Santana were selling narcotics through the El Ranchito Bar in Tijuana, and further Benavides denied that he was a member of an organization importing heroin into the United States (R.T. pp. 2513-2516).

There is also the matter of petitioner's trial attorney's trial tactics. Richard Orozco testified at a previous Habeas Corpus proceeding in June, 1983 that he did not object to the prosecution introducing evidence before the jury concerning the petitioner's narcotic activities. This was the way that the petitioner could impugn Benavides's credibility in showing his (Benavides) own narcotic activities. Mr. Orozco recognized the trade-off, i.e., Rios would be labeled a

narcotic dealer, but he weighed that risk against the need to impeach Benavides. Casting Benavides as a narcotics smuggler/courier would cast more doubt regarding his credibility in minds of the jurors. Even though Benavides was impeached with a prior inconsistent statement regarding his narcotics activities, the main thrust of petitioner's impeachment of Benavides was to show him as narcotics dealer.

In determining whether Agent Ford's report is exculpatory, favorable, and material, this court looks to the totality of the circumstances and not in the isolation or in the abstract. Benavides was thoroughly impeached, the jury already heard impeachment evidence concerning his narcotic activities. Therefore, Ford's report is not material to the issue of guilt or innocence.

For these reasons, there is no constitutional due process violation. The unintentional suppression of this report does not undermine confidence in the outcome of the jury's verdict. This new evidence does not cast doubt on the accuracy and reliability of the trial.

IV. INVESTIGATOR HAMMAKER'S TESTIMONY

At this hearing, Investigator Hammaker testified that he learned, prior to petitioner's jury trial, that the money Benavides loaned to Rios to help Rios bribe his way out of a Mexican prison came from washing dishes. This was supposedly $20,000 - $22,000.

Hammaker doesn't recall writing this in any report. He doesn't have clear recollection of how he learned of this information. He surmises, perhaps, that DDA Manual Ramirez may have told him prior to opening statements.

Petitioner seems to think that perhaps this also constitutes *Brady* error. This court finds no materiality to undermine confidence in the verdicts. This evidence is also neither favorable nor exculpatory. There is no evidence it was in a report or should have been reported. It could easily be a statement made in jest by a witness during an interview with the prosecutor prior to opening statements. The petitioner asks this court to speculate and it cannot do so for the purposes of this writ.

At this hearing, no one asked Benavides about his alleged dishwashing statement. In an interview of Benavides by Paul Sanchez, an investigator in the Orange County District Attorney's Office, (Petitioner's Exhibit B, p. 45) Benavides stated that he obtained some of these moneys working in construction, making wrought iron doors and windows. He also did cement work.

It appears that the 'dishwashing' statement was made in jest. It is not exculpatory, material or favorable to the petitioner. Also, petitioner hasn't shown sufficient foundational proof. It is fraught with speculation. This court finds no *Brady* error.

V. DISPOSITION

For the above stated reasons, petitioner's Writ of Habeas Corpus is denied.

DATED: SEP 03 1998

/s/ Judge Frank F. Fasel
FRANK F. FASEL
Judge of the Superior Court

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,	) 4 Crim Nos.) G000610) G000938)
v.	) (Super. Ct, Nos.
GENARO GONZALEZ RIOS Defendant and Appellant.	) C-48121) M-4767))
IN RE GENARO GONZALEZ RIOS On Habeas Corpus	) **OPINION**))))

Appeal and consolidated habeas corpus petition from the Superior Court of Orange County, Myron S. Brown, Judge. Affirmed.

Michael D. Abzug, for Defendant and Appellant.

John K. Van de Kamp, Attorney General, Daniel J. Kremer, Chief Assistant Attorney general, Harley D. Mayfield, Assistant Attorney General, Steven H. Zeigen and Lilia Garcia, Deputy Attorneys General, for Plaintiff and Respondent.

Genaro Gonzalez Rios appeals his conviction of murder (Pen. Code, § 187) and attempted murder (Pen. Code, §§ 664/187) in addition to the jury's findings the

murder was committed while lying in wait (Pen. Code, §190.2, subd. (a)(15)) with a principal using a firearm (Pen. Code, § 12022, subd. (a)). He argues (1) the court erred in denying a mistrial for prosecutorial misconduct, (2) the court erred in admitting hearsay of alleged co-conspirators, (3) the court erred in admitting evidence of a telephone conversation, (4) the evidence is insufficient as a matter of law to prove conspiracy to murder, and (5) the special circumstance "while lying in wait" is not proved as a matter of law. His petition for a writ of habeas corpus, consolidated with the appeal, alleges ineffective assistance of counsel.

***

The facts culminating in the murder of Humberto Perez and the attempted murder of David Benavides are long, involved, and necessary to our decision. Benavides in early February 1981 found himself imprisoned on drug charges in La Mesa prison, Tijuana, Mexico. Whether through bribery or lawful means, he was released following payment of $5,000 to his attorney. The payment, however, was by check drawn on an account without sufficient funds.

Immediately after his release from prison, Benavides and his business partner, Abel Tarango, drove across the Mexican-American border and Benavides began a search for money to cover the check. Since Rios owed Benavides $40,000 from a prior loan (to free Rios from a Mexican prison) and unpaid wages (as Rios' drug courier), Benavides placed a number of telephone calls to Rios' relatives attempting to find him. Tarango eventually drove Benavides to a home of a relative, Humberto Perez, in Placentia, to await a call from Rios.

Rios called the following day telling Benavides

he could raise only $3,000 and was sending the money to Benavides with Juan Castillo and Jose Bueno. Later that night, Castillo phoned Benavides, telling him he and Bueno, nicknamed Bala or the bullet, were lost and asked Benavides to meet them at a street corner in Anaheim. Humberto Perez drove Benavides to the corner where they parked. Bueno and another person[1] walked to the car. Bueno going to the passenger side where Benavides sat. Pleasantries were exchanged until Bueno said, "Genaro went up." Removed a gun from inside his jacket, and fired a number of times striking Benavides in the hands and thigh.

Witnesses who heard the shots saw a four wheel drive truck speed away. The car containing Perez and Benavides burst into flames. Firemen found Benavides injured and Perez dead from eight bullets.

Six months later Castillo and Rios were arrested at Castillo's home in Los Angeles. Parked outside was a four wheel drive truck.

Rios defense consisted primarily of evidence suggesting Benavides business partner, Tarango, had both motive and opportunity to commit the murders. Tarango was a partner with Benavides in a number of bars with his interest reverting to Benavides upon death. It was additionally pointed out Humberto Perez drove Benavides to meet Bueno and astillo only after Tarango mysteriously disappeared. Finally, Tarango was aware of the negotiations between Rios and Benavides and was therefore in a position to "set Benavides up" and "frame" Rios.

I

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1. Castillo was tried jointly with Rios but was acquitted. Bueno had not been apprehended.

Rios argues the court should have granted a mistrial at the close of the People's case in chief for the prosecution's failure to prove a number of accusations made in opening statement. We previously held "[u]nquestionably, the prosecution may in its opening statement refer to evidence which it believes will be produced. [Citation.] While the test for determining prejudice arising from a variance between the opening statement and the proof is no longer bad faith, three tests determine if a defendant has been prejudiced. First, was an objection lodged or a motion in limine made? [Citations.] Second, was the jury informed by the court or by the prosecution opening statement is not evidence? [Citations.] Third, did opening statement result in a violation of the defendant's Sixth Amendment right to confrontation? [Citation.]" (People v. Barajas (1983) 145 Cal.App.3d 804. 809 fn. omitted.)

Although Rios properly sought the court's protection in a motion in limine, no prejudice resulted from the perceived variance between the opening statement and proof. First, if there was a variance, the jury was repeatedly admonished an opening statement is not evidence[2]. Second the evidence supports the

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2. During the Prosecutor's opening statements, he commented: "I can't repeat this often enough. The comments his Honor has already indicated to you last Thursday, the comments that I am about to make to you right now are not evidence. I think all of you know that. There is a tendency to very often think of it as being evidence. It's not. The purpose

(Fn. cont'd.)

2. (Continued)

of an opening statement is to give you jurors a guide or a road map if you will of what we expect the evidence to show to you

prosecutor's claims. We present them seriatim. Rios asserts the prosecution failed to prove the $5,000 Benavides needed was to bribe a Mexican prison officials, Rios was arrested on drug trafficking charges

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and therefore you can't take what I have to say as evidence..."

Following Rios' motion for a mistrial, the court further instructed the jury: "The People have rested and with that resting has come at least something that has been of concern to the Court and I want to share it with you, and if any of you have any difficulty with this concept, I'd really like to have you raise your hand, and the attorneys and the Court then would discuss it with you privately. I think it's a matter of utmost importance. I had said to you prior to any of the attorneys making an opening statement that the opening statements were not evidence, were not to be considered by you as evidence. They tend to be what attorneys hopefully are going to have their case become. I think I can go so far as to say that in Mr. Ramirez's statement there were statements made which have not been proved, and I should perhaps recount for you now some of those things which were said that are not evidence in this court. I think to do that compounds the problem because then I would say remember the pink elephant he talked about, well, please don't think any more about the pink elephant. I'm going to ask each of you if you can search your minds and your souls at this moment in the time and relate to the Court that you can in fact treat all three if Mr. Orozco deems to make an opening statement as just that, opening statements that have no evidentiary value, and if you can assure this Court that you will not be prejudiced by anything that may be said during opening statement that then is not proved by the evidence presented by that part. I would as if you had made written notations of either Mr. Abzug's or Mr. Ramirez's opening statement or when Mr. Orozco makes one, if you make written comments on those, that you somehow disregard them and not look at that so that we once again limit any prejudice that may accrue to any party as a result of things that were said which were not evidence.

in 1977, Rios was released from a Mexican Prison following the payment of a bribe, Benavides was protective custody following the attempt on his life, and Tarango was unexpectedly called away for a family emergency just prior to the shooting. The evidence showed, however: Benavides was desperately searching for $5,000 to pay his attorney following his release from prison. Benavides had loaned Rios $20,000 to gain his release from a Mexican prison, and Frederick Lopez, a trustee at the Anaheim City jail, spoke with Benavides days after the shooting while Benavides was in custody. The only statement not inferentially supported, involved Tarango's opportune disappearance[3], and the prosecution was precluded from eliciting this testimony by defense counsel's evidentiary objection[4].

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2. (Continued)
Is that sufficiently clear as stated by the Court? Anybody have any difficulty with it? Does anybody believe as a member of the jury or either of our alternate jurors that as a result of the opening statement that those statements cannot and will not be completely disregarded by you as individual jurors and that your decision in this case will be based on the evidence and the evidence alone as well as the law as given to you by the Court?"

3. The prosecutor's theory was Tarango was meant to be killed, but his having disappeared placed Humberto Perez in his stead.

4. "Q BY MR. RAMIREZ: Where was Abel Tarango
(Fn. cont'd.)

4. (Continued)
when you received the last phone call, Mr. Benavides?
"MR. ABZUG: Objection; foundation.
"Q BY MR. RAMIREZ: If you know?

In short, even if the inferences to be drawn from the evidence did not support the assertions made by the prosecution, and we conclude they did, the variance was both minor in import and was adequately addressed by the prosecutor's and court's extensive admonitions to the jury. No prejudice occurred. (Chapman v. California (1967) 386 U.S. 18.)

II

Rios next argues the court erred in admitting hearsay statements of Benavides and Tarango. Benavides testified he or Tarango twice telephoned Pedro Perez, a relative living in Bakersfield, Tarango told Perez of Benavides' release from prison and the need to contact Rios. In the second call, Benavides spoke directly with Perez from Placentia and left a telephone number for Rios to call. First, Rios never objected to the testimony.[5]

It is the general rule that questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection at the trial on the ground sought to be urged on

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"MR. ABZUG: Same objection.
"THE COURT: Sustained.
"Q BY MR. RAMIREZ: Was Abel Tarango at the house when you received that last phone call?
"A: No, sir."

5. Co-counsel representing Castillo objected on the theory the statements were hearsay. Counsel for Rios did not join. Further, nothing in the record suggested a stipulation was entered permitting counsel to join in co-counsel's objections without formally objecting.

appeal..." (People v. Welch (1972) 8 Cal.3d 106, 114-115,) Second, even if we were to impute co-counsel's hearsay objections to Rios, the court ruled the evidence was admitted to explain conduct. Evidence Code section 1250, subdivision (a)(2) permits hearsay statements of a declarant, including those related to a statement of intent, plan, motive, design or mental state, when the evidence is offered to prove or explain acts or conduct of the declarant. The substance of both phone calls was to show Benavides and Tarango were attempting to have Rios telephone them (which he did) and to show an intent to go to Humberto Perez's home in Placentia to await his call. Both conversations were properly admitted. (People v. Merkouris (1959) 52 Cal.2d 672, People v. Chambers (1982) 136 Cal.App.3d 444.)

Rios last suggest Benavides testimony he received a telephone call from Castillo asking him to meet him and Bueno in Anaheim, and Bueno's statement "Genaro went up" should have been excluded as hearsay. He argues the court erred in finding the foundational requirements for conspiracy to have been met prior to introduction of the statements. Clearly their statements are hearsay and if not a part of an ongoing conspiracy, should have been excluded. (People v. Leach (1975) 15 Cal.3d 419.) However, the court's finding[6] of a conspiracy is amply supported.[7]

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6. Evidence Code section 1223 provides:
(Fn. cont'd.)

6. (Continued)

"Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if: (a) The statement was made by the declarant while participating in a conspiracy to commit a crime or civil wrong and in

Although appellant emphasizes Benavides testimony is uncorroborated, corroboration is not required. He testified Rios told him Castillo and Bueno were bringing the money. Benavides identified Castillo and Bueno as the ones who opened fire on him and Humberto Perez. The logical, although admittedly nonexclusive to be reached, is Rios sent them to kill both Benavides and Tarango. "[I]t is not" necessary to prove that the parties met and actually agreed to perform the unlawful act or that they had previously arranged a detailed plan for its execution. Rather, significantly, the agreement may be inferred from the conduct of the defendants mutually carrying out a common purpose in violation of a penal statute [citations] (People v. Lipinski, (1976) 65 Cal.App.3d 566, 575 emphasis omitted.) There was sufficient evidence to conclude foundational requirements were met permitting Castillo's and Bueno's statements to be admitted as part of a conspiracy.

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furtherance of the objective of that conspiracy; (b) The statement was made prior to or during the time that the party was participating in that conspiracy; and (c) The evidence is offered either after admission of evidence sufficient to sustain a finding of the facts specified in subdivision (a) and (b) or, in the court's discretion as to the order of proof, subject to the admission of such evidence."

7. Although the jury acquitted Castillo, we are not persuaded his statements as a co-conspirator are thereby excised from the record. The jury may well have found Rios guilty on an aiding and abetting theory and no conspiracy existed. However, the standards are different for finding a conspiracy exists as a foundational requirement for admitting hearsay and finding Castillo guilty beyond a reasonable doubt of the crime of murder.

III

Pedro Perez testified to receiving a call from Tarango attempting to locate Rios. Later on the same day, he testified he received a telephone call from Rios during which he conveyed a message Benavides wanted Rios to call the number in Placentia.[8] On cross-examination, Perez admitted he assumed he was talking to Rios based on the voice and because the caller identified himself as Rios. Counsel's objection to the lack of foundation was overruled.

Rios argues there was a lack of foundation and the court should have excluded the testimony pursuant to Evidence Code section 352 as more prejudicial than probative. When deciding the preliminary foundational requirement Rios made the statements, the judge has the sole responsibility for the decision, (People v. Collins, (1975) 44 Cal.App.3d 617, disapproved on other grounds in People v. Cole, (1982) 31 Cal.3d 568.) Here, even the equivocal statement of Perez was more than sufficient to establish Rios was the caller. Whether Perez was ultimately to be believed was a question of fact for the jury. Further, appellant's argument the testimony should have been excluded pursuant to Evidence Code section 352 has been raised for the first time on appeal and thus was waived.

IV

Relying on People v. Superior Court (Jackson) (1975) 44 Cal.App.3d 494 and a trial record replete with impeachment of the prosecution's key witness, David Benavides, Rios argues as a matter of law the evidence fails to support a conviction for murder.

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8. Neither counsel objected to this line of questioning or to the answer received.

Initially we note our function is not to reweigh the evidence. "In determining whether a reasonable trier of fact could have found defendant guilty beyond a reasonable doubt, the appellate court 'must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' (People v. Mosher (1961) 1 Cal.3d 379, 395; People v. Reilly, supra, 3 Cal.3d 421, 425.)" (People v. Johnson (1980) 26 Cal.3d 557, 576-577.) We conclude there was more than sufficient evidence from which the jury could find Rios conspired to murder or aided and abetted its commission.

Benavides needed money from Rios and telephones Pedro Peres attempting to locate him, Perez acknowledged he received the call and told Rios how to get in touch with Benavides. Rios told Benavides he was sending Castillo and Bueno with the money, with Benavides later receiving a call from Bueno asking him to meet in Anaheim. Benavides and Humberto Perez were assaulted by two men, one of whom referred to "Genaro", appellant's first name, just as shots were being fired. Finally, when arrested, a truck similar to that seen leaving the shooting was discovered at Castillo's home.

It is true Benavides was impeached on numerous occasions with prior statements made to the police and at the preliminary examination, but for the most part the impeachment involved Benavides' assertion the second killer was Castillo. The jury concluded Benavides either was mistaken or lied about Castillo's participation. However, the evidence when read in light of the judgment, shows Rios sent Bueno and another individual to kill Benavides. Nothing more is required.

Appellant's argument concerning collateral estoppel is also of little help. Jackson held where...all the alleged participants in a conspiracy are tried together, it is a logical and legal imperative that the jury cannot return a verdict of guilty against only one defendant." (Id., at p. 498.) Where separate trials are conducted, collateral estoppel bars trial only where identical issues and facts are involved. (Ibid.) Rios does not suggest his conviction is barred by Castillo's acquittal, tacitly acknowledging Bueno has not been tried. However, he argues Castillo's statements admitted under the rubric of Evidence Code section 1223 must be excised from the record to evaluate the sufficiency of the evidence.

The only statement of significance is the telephone call Benavides testified he received from Castillo telling him to meet Castillo and Bueno in Anaheim. Notwithstanding the statement was admissible as nonhearsay (i.e. a statement to explain future conduct) and the court properly found sufficient evidence of the existence of a conspiracy (see § III. infra), we find the striking of the testimony does not affect the sufficiency of the evidence. the critical evidence is Rios' statement he was sending the money with Bueno and Castillo and the shooting which resulted. the jury chose to believe Benavides was shot and Humberto Perez was killed by individuals sent by Rios. Benavides testimony was not inherently unbelievable and thus was owed the weight given by the jury. The evidence was sufficient to convict.

V

Following supplemental briefing at our request, Rios argues as a matter of law, the record does not support the special circumstance "while lying in wait."

(Pen. Code § 190.2 subd. (a)(15).) The jury was instructed upon finding appellant guilty of fist degree murder, they were to determine if the killing was intentional and was committed " while lying in wait." The instructions[9] defined "while lying in wait" as waiting and watching for an opportune time utilizing concealment or ambush to take the other person by surprise. Rios argues the mere concealment of a weapon is not the type of concealment contemplated by the statute.

At first blush, the requirement of concealment suggests ambush by hiding the person. The evidence in the instant matter supports Rios contention the murder victim was not surprised by ambush since Castillo and Bueno were expected to meet the victims and were in the open prior to the shooting. However, the Supreme Court has held in People v. Tuthill (1947) 31 Cal.2d 92 concealment of the weapon is sufficient to satisfy the requirement the murder result from the surprise. In Tuthill, the defendant concealed a rifle by placing it under him as he slept in the victim's home. When she arrived she woke him, they conversed and she left the house. Minutes later she returned. A friend waiting

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9. The court instructed the jury:.....I am now going to define lying in wait. It is a waiting and watching for an opportune time to act together with a concealment by ambush or some other secret design to take the other person by surprise. The lying in wait need not continue for any to show a state of mind equivalent to premeditation or deliberation. To constitute murder by means of lying in wait there must be in addition to the aforesaid conduct by the defendant an intentional infliction upon the person killed or bodily harm involving a high degree of probability that it will result in death and which shows a wanton disregard for human life."

outside heard gunshots and found her body inside. The court held by concealing the weapon the defendant was literally "lying in wait". (See also People v. Rosoto (1962) 58 Cal.2d 304, 355.)

Tuthill was recently followed in Domino v. Superior Court (1982) 129 Cal.App.3d 1000 where the court held the special circumstance "while lying in wait" incorporates the elements of first degree murder's "lying in wait" (Pen. Code § 189) with the added requirement of a temporal relationship between the killing and concealment. Although the jury here was instructed without regard to the element of a temporal relationship, the evidence supports the jury's finding Humberto Perez's murder was "while lying in wait."

Perez and Benavides sat in their car waiting for Castillo and Bueno to deliver money promised by Rios. When Bueno approached, the victims each asked "how things were going." Nothing suggested concealed weapons or danger. Finally, in one continuous action the guns were withdrawn and fired repeatedly at their victims. Perez and Benavides were caught in a cross fire which was the direct result of the concealment of the guns. The evidence supports the verdict.

VI

In a petition seeking a writ of habeas corpus, Rios alleges ineffective assistance of counsel. The two issues raised are whether (1) counsel's waiver of cross-examination of witness Benavides and (2) the failure to object to evidence of Rios drug trafficking constituted ineffective assistance of counsel. For the reasons stated below, we conclude it was not.

At the close of the prosecutor's direct examination of Benavides, counsel for Rios and Castillo waived cross-examination. Following the close

of the People's case, Rios' counsel called as his first witness David Benavides. The trial court, on its own motion, told both counsel they would be precluded from covering any material within the scope of the prosecutor's direct[10] examination, reciting Evidence Code section 760.[11]

The burden is on the defense to show ineffective assistance of counsel. Thus the appellant must show that trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates. In addition, appellant must establish that counsel's acts or omissions resulted in withdrawal

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10. " The Court: Will you approach the bench. "(The following proceedings had in chambers outside the presence of the jury:)

"The Court: Gentlemen, this trail will be conducted according to rules of evidence and subject matter areas that you have waived the right to cross examine on [sic] you are now not going to inquire by way of direct examination during your case in chief.

" Mr. Orozco: So I am going to be precluded from talking about anything he talked about yesterday?

" The Court: You precluded that?

"Mr. Orozco: I don't understand.

"The Court: There was an opportunity to cross examine on all areas that had been covered by direct examination. Each of you opted to foreclose that opportunity to yourself."

11. Evidence Code section 760 provides:

"Direct examination is the first examination of a witness upon a matter that is not within the scope of a previous examination of the witness."

of a potentially meritorious defense (People V. Pope, supra, 23 Cal.3d 412, 425) or his counsel failed to perform with reasonable competence and that it is reasonably probable a determination more favorable to the defendant would have resultes in the absence of counsel's failings. (People v. Fosselman, supra, 33 Cal.3d 572, 584.)" (People v. Bess (March 29, 1984, 4 Crim 17166)_Cal.App.3d_ slip opinion pp. 5-6.)

Rios has met neither test. First, although Rios' counsel at a habeas corpus hearing conducted before the trial court[12] admitted he waived cross-examination unaware he had "waived" forever matters within the scope of direct, he also gave reasons for his action; he did not want the witness to reiterate to the jury material covered on direct; and he believed the jury had rejected Benavides' testimony. Whether these tactics, when viewed post judgment, represented the "right" decision, they were within reasonable competence and will not be second-guessed.

Further, even if the only reason for waiving cross-examination was counsel's error in "forgetting" the dictates of Evidence Code section 760, the record does not demonstrate how the verdict would have been affected. Counsel provided specific questions he was precluded from asking Benavides, but he also admitted every question but one was covered by co-counsel's examination of Benavides. More importantly, the record does not furnish this court with the answers to the excluded questions. We are asked to speculate had

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12. Petitioner originally filed a petition for writ of habeas corpus in the superior court. Following a hearing where the lone witness was Rios trial counsel, the court denied relief. We were provided with a transcript of the hearing.

counsel inquired of Benavides in specific areas, Benavides would have been successfully impeached. Habeas corpus relied cannot be granted on the speculation of counsel of the court.

Finally, Rios alleges counsel's failure to object to evidence regarding Rios drug trafficking resulted in ineffective assistance of counsel. Rios ignores trial counsel's stated tactical purpose in allowing in the evidence without objection. At the evidentiary hearing, trail counsel testified he did not object to evidence of drug trafficking since the evidence also demonstrated Benavides was selling heroin in Mexico. Counsel recognized the trade off, i.e., Rios would be labeled a drug dealer, but weighed the attendant risk against the need to impeach Benavides. A tactical decision within the scope of reasonable competence will not be second guessed.

The judgment is affirmed. The writ of habeas corpus is denied.

DATED: March 30, 1984.

WE CONCUR:

/s/ SONENSHINE
SONENSHINE, J.

/s/ WALLIN
WALLIN, Acting P.J.

/s/ CROSBY
CROSBY, J.

IN THE MUNICIPAL COURT
OF THE NORTH ORANGE COUNTY
JUDICIAL DISTRICT
STATE OF CALIFORNIA

THE PEOPLE OF THE)

STATE OF CALIFORNIA,)	
	) TRANSCRIPT OF
Plaintiff,	) PRELIMINARY
	) EXAMINATION
vs.	)
GENARO GONZALEZ	) HON. DAVE BACH,
RIOS and	) JR., JUDGE
JUAN FRANCISCO	)
CASTILLO,	) Case No. NF8100274
	)
Defendants.	) No. C-48121

OCTOBER 5, 1981

MR. V. CLIFF HARRIS, Deputy District Attorney, appeared as counsel for the People.

MR. RICHARD OROSCO, Attorney at Law, appeared as counsel for Defendant Rios.

MR. RAUL PALOMO, Attorney at law, appeared as counsel for Defendant Castillo.

PATRICIA S. HARMON, Certified Shorthand Reporter, Certificate No. 2493.

DAVID AGUILAR BENAVIDES
CROSS-EXAMINATION

Q. BY COUNSEL FOR CASTILLO- ATTORNEY PALOMO. Mr. Benavides, you have an associate by the name of Abel Tarango?

A. Yes.
Q. And what is his association?

******

THE WITNESS: We had the cow in Tijuana.
BY MR. PALOMO: Q: A bar in Tijuana?
A. Yes.
Q. Is it a partnership?
A. Yes.
Q. What percentage do you own of the partnership?
A. Half and half, whatever it was clear.
Q. What would happen if you were to die to that bar?

******

THE WITNESS: I don't know.
BY MR. PALOMO: Q: Isn't it a fact that Mr. Tarango would be the owner of the bar?
A. No.
Q. Now, this $3,000 that you were attempting to get from Mr. Rios, was that going to be money loaned to you?
A. Yes.
Q. He didn't owe you any money at all, did he?
A. No.

******

Q. No, let me go back. Didn't you tell us on Friday that you were going to get this money, the sum of $3,000 from Mr. Genaro Rios?
A. Yes.

Q. And that is why you were coming up to the Bakersfield area; is that correct?
A. Yes.
Q. Now, the question is this $3,000, was that owed to you or were you borrowing the money from Mr. Rios?
A. I was asking a loan.
Q. You were asking Mr. Genaro Rios for a loan; is that correct?
A. Like a loan.
Q. Now let me go back to February the 10th of 1981. Did you not tell detective Hammaker that Genaro Rios owed you approximately $22,000?
A. Yes.
Q. Would the $3,000 then be a payment towards the $22,000?
A. If he wanted it that way, then if not, I would just want it as a loan.
Q. What were you going to do with the $3,000?
A. I was going to pay an attorney.

******

BY MR. PALOMO: Q: Mr. Benavides, did you tell the police or in particular Mr. Hammaker, Genaro Rios owed you approximately $40,000?
A. No.
Q. But you did tell him of the 22 thousand?
A. I don't remember whether I told him or not.
(HRT pp.3-5)

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THE COURT: Okay, Mr. Harris, this is a case in which

your primary witness may be a liar. That's what the case is all about, and he may not be.
(HRT p.64)

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE
DEPARTMENT 44

THE PEOPLE OF THE)

STATE OF CALIFORNIA,)
)
Plaintiff,)
)
vs.) No. C-48121
GENARO GONZALEZ)
RIOS and)
JUAN FRANCISCO)
CASTILLO,)
)
Defendants.)

HONORABLE MYRON S. BROWN, JUDGE
PRESIDING
REPORTER' DAILY TRANSCRIPT
JULY 22, 1982

APPEARANCES OF COUNSEL:

FOR THE PEOPLE: CECIL HICKS,
DISTRICT ATTORNEY
BY: MANUEL A. RAMIREZ,
DEPUTY

FOR DEFENDANT RIOS: RICHARD E. OROZCO
ATTORNEY AT LAW

FOR DEFENDANT CASTILLO:
MICHAEL D. ABZUG, ATTORNEY AT LAW

VOLUME: XI
PAGES: 1770-1922
CRYSTAL D. COSTA, C.S.R. #2458

MR RAMIREZ: Just one minor comment because I think it may cause some consternation, and I don't want it to cause consternation on the part of Mr. Abzug.
MR. ABZUG: I feel my heart.
THE COURT: Another deep sigh?
MR. ABZUG: Yes.
MR. RAMIREZ: The fact in my discussions with Mr. Benavides he has indicated to me extensively his drug relationship with Mr. Rios and the entire Rios family, and the fact that he was a drug courier and was bringing across the border significant amounts of heroin in quantities amounting to as many as ten kilos every week.

As the Court knows, and we are out of the presence of the jury, the Court knows that based on the reporter's transcript, that that was a subject that was broached by the attorneys during the preliminary hearing.

That will be mentioned and discussed during opening statement. These are conversations obviously that were had between Mr. Benavides and Mr. Rios and Mr. Benavides was in fact working as a courier for Mr. Rios that entire time which led up to the debt of forty thousand owed by Mr. Rios to Mr. Benavides, which in turn resulted–well, I don't need to get into that.

******

PEDRO PEREZ [07/27/1982]

Q. BY COUNSEL FOR PETITIONER-OROZCO: Mr. Perez, back in November of 1981, is it true that you suffered a conviction in the federal court in the Eastern

District of California?
PEREZ: Yes, sir.
Q. ---- I'm sorry, conspiracy to distribute heroin; is that true?
A. Correct.
Q. Is it not also true that in the same month and the same court you suffered a conviction for the sale of heroin?
A. Yes, sir.
MR. OROZCO: Thank you. No more questions, your Honor.

******

CROSS EXAMINATION

Q. BY COUNSEL FOR CASTILLO-MR. ABZUG: Mr. Perez, do you recall having a conversation with officer Hammaker at your residence on February 9, 1981?
A. Yes, sir.
Q. That was through a translator, was it not?
A. Correct.
Q. That conversation occurred approximately five days after the shooting of David Benavides, did it not?
A. That is correct.
Q. Isn't it true, Mr. Perez, that when detective Hammaker asked you whether you knew Genaro Rios that you told him you didn't know him?
A. Yes, I denied it.
MR. ABZUG: I have no further questions.
THE COURT: Mr. Ramirez?
MR RAMIREZ? Yes, your Honor.

REDIRECT EXAMINATION

Q. BY PROSECUTOR RAMIREZ: Mr. Perez, why did you deny it?

A. Because at the moment I thought that - - I had a lot of family that - - I had a lot of family - -

MR. ABZUG: Object to the answer. Can we take the answer at side bar?

MR. RAMIREZ: He hasn't finished it.

MR. ABZUG: I know.

THE COURT: If you would have him join us in chambers, please.

(The following proceedings were had in chambers outside the presence of the jury:)

THE COURT: Let the record reflect we're in chambers. Do you have an offer of proof as to the response to this question that has been asked, Mr. Ramirez?

MR. RAMIREZ: Yes, your Honor.

My information was that he didn't want to get the snitch label and he was afraid of Mr. Genaro Rios because he had family up in the same area that Genaro Rios had connections up in the Bakersfield area and it was his feeling if he snitched on him and said anything about Rios, that harm would result to his family and he would get a snitch jacket and harm would result to his family.

MR. ABZUG: I can't speak for Mr. Orozco, but in the absence of any further foundation that Mr. Perez had ever been threatened by Mr. Rios or had any reasonable belief for that state of mind that he's about to testify to the jury that he had, I would say that would be - - that testimony would be speculative in the extreme as extremely prejudicial to Mr. Rios and therefore should not be admitted into evidence. I think the impact on the jury of this man saying he didn't want to - - that he lied to the police because he was afraid he was going to be

killed by Mr. Rios when in fact no such threats - -
THE COURT: That wasn't the offer of proof made by Mr. Ramirez.
MR. ABZUG: That's true, but it is a clear implication of what he would be saying essentially - - the answer to the jury would convey to them the fact that he didn't want to testify against Mr. Rios that he was afraid for his family which is clear to me that he regarded Mr. Rios a threat to his safety and to my knowledge because it wasn't incorporated in Mr. Ramirez's offer of proof, nothing whatsoever is there to support that belief on behalf of that witness and in the absence of that, I would say that testimony is speculative and extremely prejudicial to Mr. Rios.
MR OROZCO: Your Honor, I would further point out in fact on that day according to police reports I have available, Mr. Perez did in fact tell officer Hammaker that a person who identified himself as Genaro did call and get a number, so he did in fact tell him that he received a phone call and gave a person who identified himself as Genaro a phone number that I guess belonged to Abel Tarango. I guess that was given to him by Abel Tarango - -
MR. RAMIREZ: I haven't talked to him about it.
THE COURT: I have no problem with that offer of proof. I'll permit you to ask the question.
Well, for the sake of caution - -
MR. RAMIREZ: Yes, let's ask him. What where you going to tell us, Mr. Perez, before we were interrupted out there?
THE WITNESS: Only that I was - - I do not recall at that moment at what time I had met him. Then since the investigators told me he was very dangerous, then I thought about my family and I have a lot of children.

That was all.
MR RAMIREZ: That, I wasn't aware of that statement about since the investigators told me he was very dangerous.
MR. OROZCO: I think that changes it a little bit, your Honor.
THE COURT: I would agree.
MR. RAMIREZ: I think he can say he was concerned for the safety of his family.
MR. OROZCO: I don't think so.
THE COURT: I think he can.
MR. ABZUG: Then obviously he's going to say it.
MR. OROZCO: Even though as I understand it, Your Honor, he made that statement because the officers told him that Genaro was dangerous, then he says well, I'm concerned for my family.
THE COURT: The question was asked of him did he deny knowledge of an individual. That was broached by defense.
MR. ABZUG: Yes.
THE COURT: Now, I think that statement by the witness can be explained by the people and his state of mind is obviously to the relevant issue and his state of mind, he was fearful for the safety of his family doesn't say it well-founded or anything else, but his state of mind is clearly relevant as to the reason why he denied association.
MR. ABZUG: We will, of course, abide by the court's ruling and I don't mean to quibble with you unnecessarily but it seems to me, Your Honor, there is a distinction, critical distinction, to be made. Where the witnesses answers are based on something that Genaro ios has said or done to him and fear that has been implanted in his mind by police officers and therefore,

on that ground, I think he should be able to - -
THE COURT: Your question is going to be what, Mr. Ramirez?
MR. ABZUG: Essentially - -
THE COURT: I am asking Mr. Ramirez what his question is going to be.
MR. RAMIREZ: In essence I would like to ask him simply if the reason he denied knowing Mr. Rios to the police is because he was afraid. That he can simply answer yes or no. Won't pursue it any further. If he understands that.

As far as the aspect of rehabilitation of this witness, I won't go into any greater detail. You understand what I am going to ask you?
MR. PEREZ: Yes.
THE COURT: And the answer will be yes or no.
MR. PEREZ: Uh-huh.
THE COURT: I am satisfied with that offer of proof. Would you continue to conduct the inquiry.

(The following proceedings had in open court in the presence of the jury:)

THE COURT: Mr. Ramirez.
Q. BY MR. RAMIREZ: Thank you, your Honor. Mr. Perez, did you deny knowing Rios because you were concerned for your family?
A. Yes, with my family.

(HRT pp.1918-1919, 2248-2254)

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE
DEPARTMENT 39

THE PEOPLE OF THE
STATE OF CALIFORNIA,

Plaintiff,

No. C-74331

vs.

JOSE MANUEL BUENO,
Defendant.

HONORABLE ROBERT R. FITZGERALD,
JUDGE PRESIDING

REPORTER'S TRANSCRIPT

May 25, 1990

APPEARANCES OF COUNSEL:

FOR THE PEOPLE: Michael Capizzi,
District Attorney
By: Eric Snethen, Deputy
Brian Page, Certified Law
Clerk

FOR THE DEFENDANT: Philip A. DeMassa
Attorney at Law

M. Armella Martin, CSR #2115
Official Court Reporter

DIRECT EXAMINATION

WITNESS: EDMUNDO APODACA

BY PROSECUTOR PAGE:

Q. Where are you currently employed?

A. I'm currently employed with the Drug

Enforcement Administration.

Q. How long have you been with the D.E.A?

A. I've been with them approximately a little over 16 years.

Q. Where you employed with the D.E.A. on February 25, 1981?

A. Yes, I was.

Q. And what case were you working on at that time?

A. A number of cases and among them was the case of - - (says name in Spanish.)

THE REPORTER: I can't understand that. Could you say that in English.

THE WITNESS: I'll spell it for you. Narciso, N-A-R-C-I-S-O; Gonzalez G-O-N-Z-A-L-E-Z; Rios, R-I-O-S.

BY MR. PAGE:

Q. This particular case, the Rios case, how did you get involved with that?

A. I was the case agent. I initiated the investigation early in 1979 and this was a result of information received.

******

Q. BY COUNSEL FOR DEFENDANT- DeMASSA

Q. Did Mr. Benavides agree to work for you as an informant?

A. Not specifically for me. I think he was going to provide some information to the Los Angeles office.

Q. For Agent Ford?

A. As I recall, but I'm not sure.

(HRT pp. 14-15, p. 53)

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF ORANGE

PEOPLE OF THE
STATE OF CALIFORNIA, Case No: C74331

Plaintiff,	DECLARATION OF JOSE BUENO IN SUPPORT OF MOTION TO DISMISS INFORMATION
v.	
JOSE MANUEL BUENO,	
Defendant.	

I, Jose Bueno after first being duly sworn, do declare:

I am a defendant in the above-entitled action. I was arrested on or about April 20, 1989 at my residence in Rancho Cucamonga by law enforcement officials. At no time prior to that time was I informed by any law enforcement officer that there was a warrant out for my arrest for murder or any other charge.

I have lived with my family in the Los Angeles/Orange/Riverside County areas from substantially before 1981 to the present. From 1981 to the present I have made no effort to conceal my identity, myself, my family or where I have lived.

In 1981, I and my wife and children had a residence at 14524 ½ Burin, Lawndale, California. At no time did any law enforcement officer come to my house, or inquire of anyone who lived there regarding my whereabouts. At no time was I informed that there was a warrant outstanding for me for any criminal charge. I have used the same California driver's license from before 1981 to today.

Attached as Exhibit B to this motion is a copy of a letter received from the Internal Revenue Service on or about July 13, 1981 at my mailing and residence address.

I have been a member of the Laborer's

International Union of North America since 1971, and have always used the same social security number. At no time has any one contacted me through the union or at work about a warrant on this case.

Without waiving the attorney-client privilege or the attorney-work product privileges, and only for purposes of this motion, and under the protection of Simmons v. United States (1968) 390 U.S. 377, I make this declaration. I have reviewed much of the reports presently available in this case. I was not present at the scene of the shooting of Mr. Perez or Mr. Benavides on February 5, 1981. Nothing I have reviewed in over 900 pages of documents from the prosecution refreshes my recollection as to where I was on the evening of February 5, 1981. Nothing I have reviewed in over 900 pages of documents from the prosecution refreshes my recollection as to where I was on the evening of February 5, 1981. I know of no documents which could help me to refresh my recollection as to where I was on the evening of February 5, 1981.

I do not know any of the people involved in the shooting, and have no way to interview or contact them. My attorney is unable to locate the vehicle or any of the witnesses in the case. Without this information and my own lack of recollection, I cannot adequately present my defense.

I declare under penalty of perjury that the above is true and correct, and if called as a witness, I could and would testify competently thereto.

I have had this declaration read to me and translated from English to Spanish by /s/ Amelia Bueno.

DATED: May 20, 1990

/s/ Jose Bueno
JOSE BUENO

I, /s/ AMELIA BUENO, certify that I am fluent in both English and Spanish. I am 18 years of age and have interpreted for Jose Bueno on many occasions. I translated the attached three page declaration from English to Spanish for Mr. Jose Bueno. He has confirmed to me that he understands and agrees with the translation as read to him from English to Spanish, and I have asked him to sign above where his name is placed.

DECLARATION OF JUAN FRANCISCO CASTILLO

I Juan Francisco Castillo, make the following declaration:

1. I am a Mexican citizen and resident of Mexico.

2. I was arrested in 1981 along with Genaro Gonzalez Rios and charged with murder and attempted murder in the criminal court in Santa Ana, California. I went to trial in 1982 and the jury found me not guilty.

3. I heard the evidence at the trial that David Benavides said I was involved in shooting the driver of a vehicle he was riding in. I was not present the night David Benavides was shot in Orange County in February, 1981 and did not shoot the driver of any vehicle who was named Humberto Perez.

4. I was not sent to deliver money to David Benavides by Genaro Gonzalez Rios in February, 1981. I was not told or instructed by Genaro Gonzalez Rios in February, 1981 to shoot either David Benavides or any other person. I was actually innocent of any criminal activity regarding the shootings of David Benavides and Humberto Perez.

5. I am willing to testify to these facts on behalf of Genaro Gonzalez Rios as they are truth. I have been willing to testify for the past two years but was told the court would not allow such testimony. If there are additional court hearings in Santa Ana, I would be willing to testify. I was not involved in the Benavides/Perez shootings and Genaro Gonzalez Rios never sent me to Orange County or gave me instructions to shoot anyone in February, 1981.

I declare under penalty of perjury that the foregoing is true and correct and I could testify competently thereto under the laws of the state of California.

Dated: December 6, 1999

/s/ Juan Francisco Castillo

JUAN FRANCISCO CASTILLO

I Juan Cortes am fluent in the English and Spanish languages, and I translated this document from English to Spanish for Juan Francisco Castillo. Mr. Castillo read the document in Spanish, understood its contents and thereafter signed it in my presence.
Date: 12/06/99

/s/ Juan Cortes
JUAN CORTES

REPORT OF INVESTIGATION
[DEA]

FILE TITLE
Jose IRIARTE-Torres
DATE PREPARED
April 3, 1981

******

16. During the week of February 17, 1981 Agent Ford was contacted by Det. Hammaker, Anaheim Police Dept. and advised that BENAVIDES had identified Francisco CASTILLO as one of the individuals that had shot him along with another male Mexican named "BALA" aka Manual Lopez-GONZALEZ. Agent Ford advised Del. Hammaker that he had a picture of a Juan Francisco CASTILLO that may be the subject of their investigation. On February 20, 1981 Agent Ford met with Det. Hammaker at Anaheim Police Department and provided him with a photograph of CASTILLO. David Benavides was shown the picture in a photo spread and he selected CASTILLO'S photo as the one who had been there when he was shot.

17. During the above meeting in Anaheim, Agent Ford talked briefly with BENAVIDES. BENAVIDES told Agent Ford that he has known Narciso and Genaro GONZALEZ For several years because he had been married to their sister, REFUGIO. He stated further that he thought Genaro GONZALEZ was the one that has set up the "hit" on him because he was being blamed for the murder of REFUGIO in Oxnard on Halloween night, 1980. He told Agent Ford that he didn't have anything to do with the murder because he was in jail in Tijuana during that time on a small cocaine bust earlier that year. Agent Ford asked BENAVIDES if he knew anything about Narciso and Genaro GONZALEZ' drug business. He denied any knowledge about it. When asked about Jose IRIARTE-Torres, BENAVIDES only said that IRIARTE was the

godfather of NARCISO GONZALEZ' children. He said he had met IRIARTE at a family party at the GONZALEZ' residence in Tijuana.

18. BENAVIDES stated that he had been to Culiacan with Genaro GONZALEZ and that GONZALEZ had a ranch 15 to 20 miles south of Culiacan at a place called Guamuchil where he raised cattle. He stated further that Genaro also own a warehouse in Culiacan that sold feed and ranching equipment. When Benavides went to jail Genaro GONZALEZ owed him money that he tried to collect. He had already spent $10,000 to get out of jail, but he claimed a government official hade made off with it and he remained in jail. He said that Abel TARANGO had helped him get out of jail. Abel TARANGO is a partner of his in Tijuana in the EL RANCHO BAR. He also stated that TARANGO had helped him make contact with Genaro GONZALEZ when he got out of jail.

19. The following week after BENAVIDES was released from protective custody by Anaheim Police Department, Det. Hammaker contacted S/A Ford and told him that an inmate BENAVIDES had gotten close to while in protective custody had told him that BENAVIDES offered him a "contract" when he got out of jail to "hit" someone. BENAVIDES was willing to provide the - - and that money to fill the contract was no problem. The inmate had apperently convinced BENAVIDES that he was a member of the MEXICAN MAFIA.

20. On February 26, 1981 S/Ford was contacted by S/A

Apodaca who informed him that he had information from Mexico that Jose IRIARTE-Torres was residing at a residence in Chino, California. He was supposed to be staying with - -

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REPORT OF INVESTIGATION
[DEA]

BY: Frank Linley, T.F.
AT: Los Angeles, CA
FILE TITLE: Jose IRIARTE-Torres
DATE PREPARED: August 24, 1981
OTHER OFFICERS: Lyons and Ford

REPORT: Interview of David Aguilar BENAVIDES on August 18, 1981.

SYNOPSIS:
Pursuant to the arrests of Genaro GONZALEZ-Rios and Juan Francisco CASTILLO, an interview of David Aguilar BENAVIDES was conducted at Anaheim Police Department.

DETAILS:
1. Subject BENAVIDES stated he was willing to discuss the GONZALEZ-Rios Brothers, however, claimed he had no direct involvement with them and had not had any contact with them for approximately five years.

2. He stated that he was aware that they were trying to kill him and he felt that it was because he had abandoned his wife and family prior to her murder.

3. BENAVIDES claimed that the brothers did not trust him enough to involve him in their business dealings but knew they were dealing heroin and knew many of their friends including Jose IRIARTE-Torres. He denied any narcotic activity on his part.

4. BENAVIDES would provide no useful information to this investigation at this time and would only discuss matters prior to 1975. He did say that everybody who knows Narciso GONZALEZ-Rios well refers to him as "CHICHO" and that this is a nickname he has had for years.

5. Due to BENAVIDES' reluctance to provide

information pertinent to this investigation the interview was terminated.

INDEXING SECTION
1. David Aguilar BENAVIDES, NADDIS
DISTRIBUTION:
REGION
DISTRICT: San Diego

/s/ Frank Linley
FRANK LINLEY
TASK FORCE AGENT
DATE: 8/26/81

/s/ Steven P. Cummins
STEVEN P. CUMMINS
GROUP SUPERVISOR
DATE: 8/26/81

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE

IN RE: GENARO GONZALEZ RIOS,

Superior Court No.

DECLARATION

Petitioner.

OF DAVID BENAVIDES

I, DAVID BENAVIDES, after being duly sworn, make the following declaration:

1. I was married to Refugio Benavides in 1980. We have several children from that marriage, including David Benavides, Jr. The date of birth of David Benavides, Jr., is July 13, 1968.

2. During part of 1980 I was imprisoned in the prison in La Mesa, Tijuana B.C., Mexico. In or around February 4, 1981 I was released from the prison in La Mesa and I travelled to the United States where I spent the night in Humberto Perez' home in Placencia in the County of Orange, California. On February 5, 1981, I was shot and Humberto Perez was killed.

3. Before I was shot on February 5, 1981, I had knowledge of the existence of a bank account in a Mexican bank with about $18,000. The bank was Banco Serfin in Tijuana, B.C., Mexico. The account was a two year certificate of deposit which was originally under both my wife's, Refugio Benavides, and my son's David Benavides, Jr., name. My wife Refugio Benavides was shot and killed on October 31, 1980. When I entered to the United States from Mexico on February 4, 1981, I knew that this bank account (certificate of deposit) existed and that I could withdraw money from it when the certificate expired.

4. At some point in 1982 I took my son David Benavides, Jr., to Banco Serfin in Tijuana, B.C., Mexico and withdrew the approximately $18,000 from the certificate of deposit and closed the account. Nobody asked me about this account or the money in

the account when I testified in Genaro Gonzalez Rios' and Juan Francisco Castillo's trial in July and August, 1982.

5. Before Genaro Gonzalez Rios' and Juan Francisco Castillo's trial in July 1982, the police officers told me I would not be prosecuted for any concession, testimony or declarations that I made to the police officers with respect to my involvement in the trafficking or sale of drugs that I might have committed n my own or together with Genaro Gonzalez Rios or any other person.

I declare under penalty of perjury under the laws of the State of California that the preceding is true and correct and that if I am called to testify I could and would testify the above. I have not been forced or pressured to sign this declaration with any promise, threat, inducement or otherwise by anyone. I make this declaration of my own free will and after taking it into consideration for a sufficient period of time.

Date: , 1994

[Legible Signature]
David Benavides

I, Annete Ancira, hereby certify that I am a fluent in both Spanish and English languages and that this is a true and accurate translation from the Spanish into the English language, to the best of my ability.

August 2, 1995
San Diego, California

/s/ ANNETE ANCIRA

for TRANS-LAANGG
Translating & Interpreting services

Federal Court Certification No.
93-444
CA State Court Certification No.
493-116-83

D.A.# M-7483

RE: RIOS, GENARO

INTERVIEW OF: DAVID BENAVIDES SR.

BY: PAUL SANCHEZ, SUPERVISING
INVESTIGATOR ORANGE COUNTY

DISTRICT ATTORNEY'S OFFICE

PRESENT: ERIC SNETHEN, DEPUTY DISTRICT ATTORNEY ORANGE COUNTY DISTRICT ATTORNEY'S OFFICE

DATE: APRIL 30, 1997

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INVESTIGATOR SANCHEZ: Okay. And uh, when... do you remember which police told you that they are not going to charge you?
BENAVIDES: No, no, no.
SANCHEZ: Which agency they were from?
BENAVIDES: I don't remember.
SANCHEZ: Was it an agency from Oxnard, from...
BENAVIDES: No, no.
SANCHEZ: ...Los Angeles?
BENAVIDES: No it wasn't there. It was...
SANCHEZ: When you were detained over there?
BENAVIDES: No, when I went to court. Before going to court.
SANCHEZ: Uh-huh.
BENAVIDES: Before the complaint was made against him to go to court.
SANCHEZ: Oh, the Anaheim Police?
BENAVIDES: Uh-huh, something like that I think.
SANCHEZ: You don't know which one it was?
BENAVIDES: No, at that time do you think I am going to know something and how I told you I was, my frame of mind, that I was still uh, I don't know. I don't know what I had in my mind, I was like lost.

SANCHEZ: uh-huh.
BENAVIDES: Still. I think I was in shock, I don't know what.
SANCHEZ: But it was the police, a police agency that told you that they were not going to, to...
BENAVIDES: Uh-huh.
SANCHEZ: ...try you or try you for any other crime.
BENAVIDES: Uh-huh.
SANCHEZ: Drugs or drug trafficking.
BENAVIDES: There you go, yes.
SANCHEZ: Okay. He says he doesn't recall as far as question number seven as to what uh, he recalls saying or hearing that the police officers told him that he would be prosecuted for any concessions, testimony declaration that he might of made. But he doesn't recall who the officers were, whether they were Anaheim, Oxnard, Federal, anybody. He says he remembers that but he just...
SNETHEN: Where, when?
SANCHEZ: When was that when they told you that?
BENAVIDES: I don't remember the date either.
SANCHEZ: Was it after they shot you?
BENAVIDES: Uh-huh.
SANCHEZ: How much time after?
BENAVIDES: I told you at that time my mind was lost.
SANCHEZ: That same day or several...
BENAVIDES: No, I don't think so. Because I was in the hospital for a long time, I don't remember how many days.
SANCHEZ: Uh-huh.
BENAVIDES: When, when woke up but I don't remember exactly to tell you...
SANCHEZ: And how, how they know that GENARO

or...
BENAVIDES: I had already given them a statement when they took me to the hospital.
SANCHEZ: Oh. but you were injured when, when they talked to you?
BENAVIDES: Yes, when I talked with the *** I talked to uh, to HAMMAKER from homicide...
SANCHEZ: From Anaheim.
BENAVIDES:... from Anaheim. Yeah.
SANCHEZ: Okay. He recalls that when he got wounded he was interviewed by Detective HAMMAKER. Uh, afterwards uh, he says he doesn't uh, how long after...
BENAVIDES: I don't remember...
SANCHEZ: ... that he, he made the statement. Or the statement was made to him. But he uh, recalls giving HAMMAKER the name of uh, GENARO RIOS as being the person behind him being shot.
SNETHEN: Did he ever talk to EDWARDO APODACA?
SANCHEZ: Did you talk to Agent EDWARDO APODACA?
BENAVIDES: Police?
SANCHEZ: Uh-huh.
SNETHEN: Federal.
SANCHEZ: He's from the D.E.A.
BENAVIDES: Is he Municipal police?
SANCHEZ: It's Federal, he's from the D.E.A.
BENAVIDES: Oh, no, no. I don't remember.
SANCHEZ: No? Do you remember another named KIM FORD?
BENAVIDES: No.
SANCHEZ: No.
BENAVIDES: The only one I remember is

HAMMAKER.
SANCHEZ: HAMMAKER. Okay.

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SUPERIOR COURT FOR THE
STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE
DEPARTMENT 41

THE PEOPLE OF THE
STATE OF CALIFORNIA,

Plaintiff, No. M-7483
WRIT OF

vs. HABEAS CORPUS
GENARO GONZALEZ
RIOS,
Defendant.

HONORABLE FRANK F. FASEL,
JUDGE PRESIDING

REPORTER'S PARTIAL TRANSCRIPTS
APRIL 17TH 1998

APPEARANCES OF COUNSEL:

FOR THE PEOPLE: MR. SCOTT SCOVILLE,
Deputy District Attorney

FOR THE DEFENDANT: MR PHILIP DeMASSA,
Attorney at Law

WITNESS: BENAVIDES [04/17/98]

Q. BY DEFENSE COUNSEL- MR. DeMASSA: Do you recall telling Agent Ford at a meeting in Anaheim that you had known Narciso and Genaro Gonzalez for several years because you had been married to their sister Refugio?
A. Yes, sir.

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Q. Did Agent Ford ask you if you knew anything about Narciso and Genaro Gonzales's drug business?

A. Yes, sir.

Q. And did you tell Agent Ford that you did not have any knowledge about their drug business?

A. Yes, sir.

Q. And do you recall having an interview in August of 1981 with Agent Ford and two L.A. County Sheriffs?

A. I don't remember.

(HRT p.27)

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WITNESS: BENAVIDES [04/24/98]

Q. BY PROSECUTOR-MR. SCOVILLE: Okay. And looking at exhibit no. 5 for identification, you indicated there that you would not be prosecuted?

MR. DeMASSA: Is this exhibit - - paragraph 5 or exhibit A?

MR SCOVILLE: I'm sorry. Exhibit A, paragraph 5. Sorry about that.

BY MR. SCOVILLE: Q. Do you remember that, that you would not be prosecuted?

A. I don't understand that word. All I know is that they were going to protect me.

Q. But you said - - you told someone to write that you would not be prosecuted?

A. I did give these answers, but I didn't tell them to write it. If they wrote it, that was on their own.

Q. So you didn't tell'em to write this No. 5 of

exhibit A then?

A. Not exactly, No, sir.

Q. But you're saying back in 81', someone told you that they would protect you?

A. Yes, sir.

Q. And did they indicate how they would protect you?

A. That they weren't going to give me jail or something like that for helping Mr. Gonzalez.

Q. And what did you do to help Mr. Gonzalez?

A. I worked marijuana and that.

Q. And that's what you testified at trial?

A. Yes, sir.

Q. That you were selling marijuana and cocaine?

A. Yes, sir.

Q. Did you ever traffic that?

A. No. No, sir.

Q. So why did you put in here in the declaration for your involvement regarding trafficking?

A. Because I helped Mr. Gonzalez.

Q. Did you help him transport?

A. From Mexico to Tijuana, yes.

Q. Did you ever help Mr. Rios transport drugs in the United States?

A. Sometimes, yes, sir.

Q. And when was that?

A. I don't remember the exact date, sir.

Q. Now, we talked about - - before we left about the fact that you said that you would not be prosecuted for any concessions; do you remember us talking about concessions?

A. I don't understand the word.

******

Q. And what does concessions mean?
A. I didn't say that word. They wrote it, sir.
Q. And what did you mean that you wouldn't be prosecuted for any testimony?
A. That's what they told me. I don't understand about anything. About those things.

******

Q. Now, Mr. Benavides, you had indicated that per this declaration that you wrote that somebody or some police officers made you some promises of protection; is that correct?
A. Yes, sir.
Q. How did you know that they were police officers?
A. They identified themselves to me, but I don't remember exactly who they were.
Q. Were they wearing any uniform that you recall?
A. No, I don't remember, sir.
Q. And where were you at the time when they came?
A. At that time, I'm not sure. I don't remember if I was in the hospital or in another place. I don't remember.
Q. And isn't - - isn't it true that after you got out of the hospital, you actually went to Anaheim for your protection?
A. Yes, sir.
Q. 'Cause they were concerned for your safety, weren't they?
A. Yes, sir.
Q. And they did provide you some protection,

didn't they?

A. Yes, sir.

Q. And is that protection that you has asked for?

A. I don't remember, sir.

Q. And you indicated that this promise of protection came prior to the trial of Mr. Rios; is that correct?

A. Yes, sir.

Q. And you don't recall if you were in shock at the time?

A. Yes, sir.

Q. So it's quite possible that you were still in shock when they talked to you about this protection?

A. It's possible, sir.

Q. And you indicated that when this promise came about, you weren't sure if you were in the hospital or not; is that correct?

A. Yes, sir.

Q. But you believe that you were in Santa Ana for your protection?

A. Yes, sir.

Q. And how long were you in Santa Ana for your protection?

A. I don't remember exactly how long it was, sir.

Q. And where were you in Santa Ana? Do you recall?

A. In a cell, sir.

Q. Would it be fair to say that you were still either injured at the point in time that they came and asked or told you that they'd give you protection?

A. Yes, sir.

Q. Now, you remember who the prosecutor was, the person who represented the district

attorney's office back in 1981? Ann individual by the name of Manny Ramirez?

A. Yes, I remember him, sir.

Q. And you saw him a few weeks ago when you where here testifying initially; do you recall?

A. Yes, sir.

Q. Was he the individual that talked to you about giving you protection?

A. It's possible, sir. I don't remember exactly who it was.

Q. So it could have been him?

A. It could have been him. Yes, sir.

Q. And how many people came to that meeting that you had where there were going to give you protection?

A. I don't remember, sir.

Q. Was there more than one person?

A. It's possible.

Q. Well, what do you remember?

A. Hardly anything, sir.

Q. But you remember someone came?

A. Yes, sir.

Q. But you don't recall what they said?

A. What they asked me about this that I have here.

******

Q. So you don't recall if there was any conversation with Mr. Ramirez about any promises?

A. I don't remember exactly, sir.

Q. Do you recall talking to Mr. Ramirez just prior to your testimony and the trial in August of 1982?

A. I don't remember, sir.

******

Q. Well, do you recall talking to Mr. Ramirez just before trial began in around August of 1982, where you indicated to Mr. Ramirez that you were trafficking large quantities of contraband?
A. Yes, sir.
Q. You recall telling him that?
A. Not exactly, but it is possible, sir.
Q. Well, either you remember or you don't. Do you remember?
A. At the time my mind wasn't very clear. I didn't remember a lot of things.
Q. And this time frame that you're talking about when your mind wasn't very clear, was that from the time that the accident occurred or the shooting until the trial?
A. I don't understand the question.
Q. Well, you said your mind wasn't very clear?
A. Yes, sir.
Q. What time frame are we talking about that your mind wasn't very clear?
A. All the time I had like a trauma, like I forgot, like my mind didn't want to go back into those memories.
Q. Would it be fair to say that soon after the shooting occurred that that was more severe, or did it - - was it pretty severe the whole time?
A. It was very severe.
Q. And your memory regarding things that happened back around that time was unclear too, would that be fair to say?
A. Exactly, yes.
Q. 'Cause you recall testifying regarding a

description of the shooters, and then later your description would change a little bit?

A. It's possible, sir

Q. And would that be because of the trauma?

A. It's possible, yes, sir.

Q. So as far as you know, you're not sure if Mr. Ramirez gave you promises or not?

A. In that, I am sure.

Q. You are sure that you're not sure then, right?

A. I am sure the promises that were made to me.

Q. But you don't recall who said it?

A. No, sir.

Q. And you never told anyone?

A. I don't remember that, sir.

Q. You don't remember telling Mr. Ramirez?

A. No, sir.

Q. Do you remember telling Mr. Hammaker?

A. I spoke to be Mr. Hammaker, but I don't remember exactly what we spoke about.

Q. And you talked to Mr. Hammaker a lot, didn't you?

A. Yes, sir, several times.

(HRT pp. 8-20)

******

Q. And you remember the person that was here last week, an Agent Apodaca?

A. Yes, sir.

Q. Do you remember ever talking to him back in 1981?

A. Not exactly, sir, but I do remember - - I did remember, uh, they told me about it.

Q. You remembered what?

A. That he had spoken to me.

Q. Do you have any independent recollection of that?
A. Not exactly, sir.
Q. Do you have any recollection of what he siad to you?
A. No, sir.
Q. Was Agent Apodaca one of those people that gave you promises?
A. I don't know, sir.
(HRT pp. 22-23)

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Q. Do you recall an individual by the name of Agent Kim Ford?
A. Yes, sir.
Q. And how do you remember him?
A. The other day that I saw him here in court, sir.
Q. And then you remembered him?
A. No, sir, because they told me.
Q. Well, do you have any recollection of him?
A. Not when he spoke to me.
Q. Do you ever have a recollection of a conversation where you were asked to provide information about your in'laws, Mr. Rios and family?
A. Yes, sir.
Q. And do you recall indicating that you were uncertain about helping 'em because you were concerned for your safety?
A. Yes, sir.
Q. And this conversation, is this the conversation we're talking about where you were given promises?

A. I don't remember, sir.
Q. Do you recall that you were - - do you decline to assist in that investigation to help provide him information regarding your brother-in-law?
A. They only offered me money if I gave them some information.
Q. And did you take the money?
A. No, sir.
Q. So they said that we'll give you money if you give us information?
A. Yes, sir.
Q. And you didn't take it?
A. No, sir.
Q. So you didn't provide information for them?
A. No, sir.
(HRT pp.24-25)

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Q. And you recall talking to him while you were in the hospital and then after you went into protective custody; correct?
A. Yes, sir.
Q. And how long were you in protective custody?
A. I don't remember how much time it was exactly.
Q. Well, did you stay in protective custody until the trial?
A. I don't remember, sir.
(HRT p.27)

******

Q. Mr Benavides, would it be fair to say that you don't recall any details regarding the time when these alleged promises were made to you; is that

correct?

A. I remember the promises that were made to me, but I don't remember who did them,

Q. And what was the specific promise they made?

A. The promises that they made to me were what's written here, we're talking about. This.

Q. Okay. But you tell me?

MR. DeMASSA: Your Honor, may the record reflect he's indicating exhibit A in front of him?

THE COURT: Yes.

BY MR. SCOVILLE:

Q. You tell me, Mr. Benavides, 'cause you've already indicated some of that declaration is incorrect, so you tell me what they said?

A. Everything that's here is correct except for some words like the word "concession," that I don't understand it and I don't know why they put it here, but everything else is true.

Q. Well, you tell me in your words what they said?

A. That they weren't going to give me any jail time is I helped them.

Q. And helped them in what regards?

A. To tell who had hurt me and all of that.

Q. So they told you that you wouldn't go to jail if you told'em who hurt you?

A. That's true, sir.

(HRT pp.27-28)

******

Q. Well, they wanted to help - - They wanted your help to solve who attempted to kill you?

A. Yes, sir.

Q. Regarding what happened?

A. Yes, sir.

Q. And they said that if you help us in the homicide

you won't go to jail; is that what they said?

A. Not exactly. That's not what I understood exactly.

Q. Well, what is it that you understood then?

A. Well, they asked me about Mr. Rios' activities. They wanted to know about Mr. Rios' activities.

Q. And you knew about his activities?

A. Yes, sir.

Q. And what else did they want to know?

A. That they wanted to know all of Mr. Rios' activities and that they would protect me if I told them.

Q. And so you told 'em everything?

A. Yes, sir.

Q. And how much - - how long did you talk to 'em about all that?

A. I don't remember.

Q. And was there a lot of information you had regarding Mr. Rios?

A. All the information that I gave is written down here. It wasn't much.

Q. So all the information you had is that you helped him?

A. Yes, sir.

Q. You didn't give 'em dates or anything like that?

A. No, sir.

Q. You didn't give 'em where it happened or anything like that?

A. No, sir.

Q. You didn't tell 'em how much dope you were dealing?

A. No, sir.

Q. And you didn't tell 'em how much money you made from the dope sales?

A. No, sir.
Q. So you just said I dealt with Mr. Rios and they said okay, we'll promise you protection?
A. Yes, sir.
Q. And that was it?
A. That I remember, yes, sir.
(HRT pp.28-30)

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Q. This conversation you had with the officers happened rear the time of the shooting?
A. It was after the shooting.
Q. Correct, because they wanted your help?
A. Yes, sir.
Q. And they were investigating this homicide and attempted homicide and they needed your help?
A. Yes, sir.
Q. And you were still in trauma?
A. Yes, sir.
B.

REDIRECT EXAMINATION

BY MR. DeMASSA:

******

Q. Yes. Did you realize that if you told officers that you were involved in drug dealing, that you would - - you could put yourself in danger of being prosecuted in Criminal Court?
A. Yes, sir.
Q. When you talked about seeking or getting a promise of protection from the officer, did that protection refer to not being prosecuted?

A. Yes, sir.

Q. When you use the word protection, were you referring to a bodyguard or a fear of prosecution?

A. Fear of being prosecuted.

Q. When you told Mr. Scoville that they promised protection, that wasn't that they were going to provide a bodyguard for you; is that correct?

A. No, sir.

(HRT pp.30-32)

******

WITNESS: EDMUNDO APODACA
DIRECT EXAMINATION

BY MR. SCOVILLE:

Q. Mr. Apodaca, were you employed with the department, the D.E.A., during the years of 1980, 1981?

A. Yes, I was.

******

Q. And where you stationed out of, so-to-speak?

A. During that time I was in San Diego, California.

Q. And in that capacity in reference to today, did

you have an opportunity or did you have an opportunity back during the time in 1980 or 1981, have any dealings with an individual by the name of David Benavides?

A. Not dealings in particular. I did in one occasion participate in an interview of him.

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Q. And during that interview do you recall the specifics of what was discussed?

A. Not specifically as to what we discussed. I remember that at one point I did try to - - to elicit his cooperation with the government in an ongoing case of the Narciso Gonzalez Rios family.

Q. Was that your purpose in talking to him?

A. Basically, yes.

Q. Did you have any involvement with regards to the shooting that had occurred a few days before?

A. Not specifically, as I can recall.

Q. And so your objective in talking to him in February was to obtain information regarding Narciso's drug activity?

A. Yes.

Q. And as a result of that conversation, did Mr. Benavides agree to assist you with that?

A. He, as I recall, had some inkling of cooperating because he did want to retaliate against the family for him being shot at, but there were no specifics as to who he would cooperate for, would he be cooperating with me as an agent or would he be working with someone out of the Los Angeles area.

Q. Did you receive any information from him that

you found beneficial?

A. No.

Q. Did you receive any information at all from him regarding narcotics dealings?

A. That was the first and only time that I ever spoke to Mr. Benavides.

Q. And did you talk to him about any specifics?

A. The trafficking activities of the Gonzalez Rios family.

(HRT pp.52-54)

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CROSS-EXAMINATION

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BY MR. DeMASSA:

Q. At the hearing on the Bueno hearing on either May 25th or June 1st, 1990, you indicated that you thought that he might have - - that Benavides might have been an informant for Kim Ford; correct?

A. No. I said that he, if we were going to provide information, that more than likely he would work for Kim Ford.

Q. Did you say more than likely?

A. I don't remember my specific words.

Q. Have you seen the transcript?

A. I think defense - - or prosecutor just read them.

Q. You stated not specifically for me, I think he was going to provide some information to the Los Angeles office?

A. Was going to, yes.

Q. Right. Where did you get that information?

A. Just from my conversation with him, an I told him that if he was going to provide information that Kim Ford was the guy to talk to.

Q. Okay. Did he tell you that he was thinking of becoming - - of providing information? Did Benavides tell you he was thinking of providing information?

A. Let's put it this way, the seed was planted and he was given the opportunity to provide information if he decided to come forward with it.

Q. How was the seed planted?

A. I asked him to provide information,

Q. And what did he say?

A. I don't recall exactly what he said, but words to the effect that he would think about it.

(HRT pp.61-62)

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WITNESS: ROBERT HAMMAKER
(7/21/98)

BY MR. DeMASSA:

Q. Did you ever talk to Benavides about drug dealing of his relatives?

A. No, sir, I did not.

Q. Up to the time of the trial, were you - - just before the opening statements, were you present when Benavides told a District Attorney that his relatives were involved in drug dealing?

A. No, sir, I was not.

Q. When did you first hear information that Benavides was involved in drug dealing with his relatives?

A. Well, that was an insinuation right from the start when - - in talking to Skeeters. But I never actually talked to him about what his involvement in the drug dealing was, or what he actually did, I never did that.

Q. On the day - - you were the investigating officer that sat in the court with the district attorney Mr. Manny Ramirez?

A. Yes, sir.

Q. Your case?

A. Yes, sir.

Q. So you were present when then district attorney Ramirez told the judge and the jury that Mr. Benavides was involved in transporting kilos or pounds of heroin and drugs across the border; do you recall that?

A. Yes, sir, I do.

Q. Okay. Had you reviewed that information since, in the last six months?

A. No, sir I haven't.

Q. Was that the first time you heard that information?

A. That was the first time that I had heard David Benavides actually admit that that's what he was doing.

Q. And you weren't present when Benavides was debriefed by the district attorney and obtained that information from Mr. Benavides?

A. It was my understanding from Mr. Ramirez that he talked to David Benavides just before David Benavides went on the stand. And that was the

first time that he had told any of us that there was a question about $20,000 or some other amount of money that was lent to Genaro Rios that was owed to him. And when he was questioned about where this money came from, and he said he got - - saved it washing dishes. And it wasn't until that point in time when Manuel Ramirez was interviewing him, prior to going on the stand, and I was not present, that he admitted to Manuel that it was from muleing dope, or trafficking drugs.

Q. And who was present in that interview?

A. Manuel Ramirez and David Benavides.

Q. And have you seen any notes of that interview any place?

A. No, sir, I did not.

Q. Did you interview Benavides about that later?

A. No, sir, I did not.

Q. Were you aware at that time and your other conversations with Benavides, prior to trial date, Benavides only said that he had loaned some money to his brother?

A. Brother-in-law.

Q. Brother-in-law, I'm sorry, to help his brother-in-law get out of jail?

A. Help Genaro get out of jail.

Q. Right. whether it was $22,000 or 20- or $30,000?

A. Or whatever.

Q. And in all those interviews, is this a fair statement that never was there an inquiry made by you as to the source of that money?

A. Yes. he told me that it was money that he has saved from being - - from washing dishes in

restaurants.

Q. Now, which report is that in?

A. I don't recall that it's in any reports.

Q. The statement you just made that David said the money was from washing dishes, money he saved from washing dishes in a restaurant, is not in the report. But you had asked him that question prior to the trial?

A. Yes, sir.

Q. Why is it not in any report?

A. I do not know why I didn't put it in there.

Q. Well, when you're sitting there at the trial, when Deputy D.A. Ramirez was telling the judge and the jury about David muleing, and that's where this debt came from, did you point out to district attorney Ramirez that you had other information which would be inconsistent with that theory?

A. Manuel Ramirez already had that information. He apparently didn't believe that. And he is the one that actually questioned David about it.

Q. Can you point me to one interview of Benavides in which that statement you've just testified to regarding the dishwashing savings is reflected?

A. No, sir, I cannot.

Q. Why not?

A. I don't know. I don't know. Actually I don't know exactly when it occurred. It may have been right prior to trial when this all occurred.

Q. There are a number of transcribed interviews with Benavides, correct?

A. Yes, sir.

Q. There are many tape recordings of Benavides being interviewed?

A. Yes, sir.

Q. And the subject of the money that supposed debt between Benavides and Genaro Rios comes up on almost every interview, correct?

A. Yes, sir.

Q. David owed - - Genaro owed David $20,000, helping him get out of jail, right?

A. Yes, sir.

Q. And there's never any explanation in any of those transcripts as to where that money came from?

A. Well, it's been like 17 years. This may have been a conversation between Manuel and I right at the time of the trial, too. Maybe that's where it came from. I don't know exactly where that come up. But, I know that Manuel was not buying the fact that he saved $20,000 washing dishes. And he wanted all the facts straight before he put David on the stand.

Q. I guess the question to me is I'm looking for that - - where that initial fact came from. And I'm asking you to point to me something in the murder book where that fact exists.

A. I don't know what it does.

Q. And the reason it's not in the murder book was you didn't think it was important, or you just didn't put it in there?

A. At this time I don't recall exactly when it did occur. And it may have occurred at the time of trial, when an explanation came out about where the money actually came from.

Q. But, were you present when Benavides told District Attorney Ramirez that the money had come from washing dishes, and he had saved the money?

A. No, I was not. And it may have been that Manuel is the one who actually told me.

Q. Is that statement in any report that you prepared at the time of the trial?

A. No, sir.

Q. Det. Hammaker, I don't need to go through all the transcripts to show you that the times that Benavides said the money that was $20,000, and that there was no further follow-up in those conversations as to the source of that money; is that - - you agree with me, that that's the status of the record?

A. Yes, sir.

Q. Have you reviewed those transcripts?

A. No, sir, not all of them.

Q. Have you reviewed some of them?

A. Yes, sir.

Q. Which ones?

A. I don't recall at this time. I've been reading a lot of this stuff when I had the time. And it's kind of hard to keep everything straight anymore.

Q. Right, they're voluminous interviews?

A. Yes.

Q. They would take 50 to 100 pages. And the money that was allegedly owed is mentioned in those transcripts and tapes, correct?

A. Yes, sir.

Q. At one time you wrote 20 or some maybe five or 10,000, and you had Narciso, and crossed out Narciso and put Genaro's name?

A. That's correct.

(HRT p.50-56)

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CONSTITUTION
OF THE
UNITED STATES OF AMERICA

AMENDMENT 5

Criminal actions-Provisions concerning-Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise, infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in

the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 6

Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and the district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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Sec. 5. Power to enforce amendment.

The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

UNITED STATES CODE

28 U.S.C. § 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

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§ 2253. Appeal

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(c)(1) Unless a circuit justice or judge issues a certificate of appealability , an appeal may not be taken to the court of appeals from-

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court;

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(2) A certificate of appealability may issue under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of the State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the Unites States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that-

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that-

(A) the claim relies on-

(i) a new rule of constitutional law, made

retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State's court determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the

court may appoint counsel for an applicant who is or becomes financially unable to afford counsel except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section governed by section 30006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 22. Habeas corpus and Section 2255 Proceedings

(a) Application for the Original Writ. An application for a writ of habeas corpus must be made to the appropriate district court. If made to a circuit judge, the application must be transferred to the appropriate district court. If a district court denies an application made or transferred to it, renewal of the application before a circuit judge is not permitted. the applicant

may, under 28 U.S.C. § 2253, appeal to the court of appeals from the district court's order denying the application.

(b) Certificate of Appealability.

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue. The district clerk must send the certificate or statement to the court of appeals with the notice of appeal and the file of the district-court proceedings. If the district judje has denied the certificate, the applicant may request a circuit judge to issue the certificate.

(2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judge of the court of appeals.

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